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REPORT

From the Select Committee on Scotch Entails.

Ordered, by The House of Commons, *to be Printed,* 28 *March* 1828.

THE SELECT COMMITTEE to whom the BILL to alter and amend the Law concerning Entails in that part of Great Britain called *Scotland*, was referred; and who were empowered to report the MINUTES of the EVIDENCE taken before them, together with their Observations and Opinion thereupon, if they shall so think fit, from time to time, to the House;—HAVE considered the matter referred to them, and have agreed upon the following REPORT:

YOUR Committee have proceeded to examine Evidence on the subject of the Bill referred to their consideration, which they deem it important to report forthwith to the House; and they have come to the conclusion, that the operation of the Acts relative to the Entail of Lands in *Scotland* is found to be attended with many evil consequences; but Your Committee propose to examine further Evidence upon this subject, and, without confining their attention to the specific remedy provided in the Bill referred to them, to consider what remedy it may be expedient to recommend.

28 *March* 1828.

BIBL. LONDIN

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MINUTES OF EVIDENCE

Lunæ, 17° *die Martii*, 1828.

THOMAS FRANCIS KENNEDY, ESQUIRE,

IN THE CHAIR.

Patrick Irvine, Esquire, called in; and Examined.

Patrick Irvine, Esq.

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HAVE you been engaged for a considerable period in the profession of the law in Scotland?—I was admitted Writer to the Signet in the year 1797.

And you have practised in the profession of the law since that time?—I have.

Do you also possess a landed estate in Scotland?—I do; in Aberdeenshire.

Is that estate entailed?—It is not.

Have you had occasion to consider the law of Entail in Scotland with peculiar attention?—I have had occasion to do so, generally, in the course of my profession. I have likewise had occasion to do so particularly in framing deeds of Entail, with the utmost attention, that there might be no possibility of defeating the provisions of them; and sometimes I have been employed in considering Entails with a view to defeat restrictions in other Entails. It appeared to me that I could not do a more acceptable service to the landed interest of Scotland, and to the community in general, than to bring under consideration the state of the law of Entail and the consequences arising from it, and I accordingly did so in the end of the year 1825.

In what way do you mean that you brought the subject under the consideration of the public?—By publishing a small book on the subject.

Do you consider that the existing state of that law calls for the consideration of the Legislature?—I certainly do.

Do you happen to know any thing of the opinions of other professional gentlemen in Edinburgh, respecting the state of that law?—I know that a very general professional opinion prevails, that a remedy for existing evils is much required.

Do you consider that the opinion to which you allude, has grown within your memory; that it has become more prevalent in later times?—I certainly think it has.

Do you think that there has been a progressive opinion upon this subject since the period when you became acquainted with the profession of the law of Scotland?—I think so.

Do you think that the opinion of professional gentlemen, and of the public, has been attracted to this subject, especially within the last few years?—I believe it has.

Have there not been meetings of entailed proprietors in Scotland, founded on the opinion, that a remedy for existing evils under Entails, is called for?—Yes, there have.

Where have those meetings taken place, in Edinburgh?—In Edinburgh; and perhaps I may be allowed to add, that the notice which was taken in the Edinburgh Review, of the publication which I mentioned in 1825, tended very much to call public attention to the subject.

Were those meetings of professional men?—Partly professional men and partly entailed proprietors.

What is the precise nature and character of an Entail in the law of Scotland?—I do not think I can answer that question in a satisfactory manner, without calling the attention of the Committee to the terms of the statute under which Entails are executed in Scotland. I shall therefore state the exact terms of the statute, in so far

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far as is necessary to the understanding of the subject. It " statutes and declares that " it shall be lawful to His Majesty's subjects to tailzie their lands and estates, " (Tailzie means to Entail) to tailzie their lands and estates with such provisions " and conditions as they shall think fit, and to affect the said Tailzies with irritant " and resolutive clauses, whereby it shall not be lawful to the heirs of Tailzie to sell, " annailzie (annailzie means alienate) or dispone the said lands, or any part thereof, " or contract debt, or do any other deed whereby the same may be apprised, " adjudged, or evicted from the others substitute in the Tailzie, or the succession " frustrate or interrupted, declaring all such deeds to be in themselves null and " void; and that the next heir of Tailzie may immediately, upon contravention, " pursue declarators thereof, and serve himself heir to him who died last infeft in " the fee, and did not contravene without necessity any ways to represent the " contravener."

Perhaps I may mention, that by representing means, that the heir who represents his ancestor becomes liable for his debts. The Act then provides, that such Tailzies only shall be allowed in which the aforesaid irritant and resolutive clauses are inserted in the title deeds. And that the original Tailzie shall be produced before the Lords of Session judicially, who interpose their authority for recording it. A record is thus established, in which the names of the maker of the Tailzie, and of the heirs of the Tailzie, and the general designation of the lordships and baronies, and the provisions and conditions contained in the Tailzie, with the aforesaid irritant and resolutive clauses, are to remain. The Entail when thus regularly made, becomes to all succeeding generations the absolute law of the estate. The clauses generally inserted in Entails, are, in the first place, an appointment of an order of succession, which, if the case be supposed, that it is the intention of the Entailer that male heirs shall be preferred to female heirs, he does so in the following manner: In stating it I shall endeavour to avoid technical formalities, and merely state the general nature of the clauses. He calls to the succession *A.* and the heirs male of his body, whom failing *B.* and the heirs male of his body, whom failing *C.* and the heirs male of his body, and so on. As the heirs male may be exhausted, he then introduces a female to keep up the succession, and generally reverts to the heir whom he had first called, being the heir female of *A.* The eldest heir female always succeeding without division, and the heirs male of her body, and so on in the case of *B.* and *C.*, &c. As the heirs male may still be exhausted, and when he has gone over the male order of succession, in the manner I have mentioned, he then reverts again to the heirs female of *A.* and the heirs female of *B. C.* &c., and in this manner, as far as the Entailer can describe his posterity either from his knowledge or his imagination, he carries on a series of succession restricted in perpetuity, instead of each heir in their legal order of succession taking it as the heirs of unentailed proprietors do.

The next important clause (as it seems to be generally considered from its being introduced into almost every Entail) is an obligation to assume the name and to bear the arms of the Entailer; sometimes it is provided, that no other additional name and arms shall be assumed, while other Entails give a special permission to assume other names, and to use other arms quarterly with the arms of the Entailer when any other entailed succession opens.

The next clauses are general prohibitions against altering the order of succession, contracting debt so as to burthen or affect the entailed estate, alienating the estate or any part of it, even for valuable considerations, or against doing any act or deed contrary to the conditions and provisions of the Entail. The entailer binds every heir to ingross in his subsequent title-deeds the order of succession, and the whole conditions and restrictions (usually denominated fetters) contained in the deed of Entail. Under the terms of the statute, which are very general and comprehensive, it is in the power of every entailer to insert in his Entail such conditions and provisions as he sees fit. These are enforced by what are denominated in the statute, irritant and resolutive clauses. The meaning of these expressions is, where an heir of Entail contravenes (meaning) disobeys the provisions and conditions contained in it; it is declared by the irritant clause, that all such deeds or acts shall be null and void. And the meaning of the resolutive clause is, that the heir so disobeying the conditions and provisions contained in the deed of the entailer, shall forfeit and lose his right to the estate itself. In this manner all deeds done contrary to the Entail, become null and void; and the right of the heir in possession to the entailed estate, may be declared by any subsequent heir to become null and void, in consequence of his disobeying the conditions of the Entail.

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Is there any limitation to the period of forfeiture under the resolutive or irritant clauses, that is to say; supposing that any heir of Entail violates the conditions of the Entail, is there any limit which will bar an action against his descendants in any succeeding period, when any of his descendants may be called to account?—There may be a limit so far as regards his descendants; but so far as regards the heir who forfeits, there is no limitation of period so far as regards his right.

As long as he is alive that is, but supposing that the heir of Entail transmits the estate to the heirs of his body, are those heirs of his body liable through succeeding generations to a forfeiture?—Generally, I should apprehend not; I should apprehend that no heir is liable to the forfeiture of his predecessor, if he has taken up the Entail.

Is he not liable to be questioned for his acts?—Each heir is liable for his own acts, but not for the acts of his predecessor.

May any remote substitute of Entail proceed against the heir in possession, in case of a forfeiture?—Yes, the most remote may.

Though he has no interest in the forfeiture, no immediate interest in the Entail?—It has been decided by the court of Sessions, that the 25th substitute in an Entail (independent of all that may come into existence and intervene) that the 25th substitute has a right to call upon the heir in possession, to fulfil the conditions of the Entail, so that it may be carried down to posterity, and that he may have his chance of succeeding.

Have you known many such instances?—It has been decided in one case; and the principle is considered as established.

Have you known any instance of forfeiture of the heir in possession, trying to vitiate the Entail?—There have been instances, I believe, in the court; but heirs are very much upon their guard.

Do you know of any instance of a man forfeiting the estate, by going against the deed of the donor?—There have been repeated instances, I believe, of cases tried, whether there was such a forfeiture incurred or not.

Has any instance ever occurred in which there has been a forfeiture, and the estate given over to the remainder man in consequence of his acts?—I am not at present aware of an instance exactly of that sort.

Is it not the practice of the court to allow the heir in possession, even if strictly speaking, according to the letter of the Entail, he has incurred an *irritancy*, to purge his *irritancy*; is not the universal practice to give him the opportunity of doing the act he had neglected to do?—It is so; and I believe the court is generally disposed to allow the heir to do so.

Suppose the heir in possession fails to register the record, and to register the Entail, and incurs an irritancy thereby, if a question were raised by any substitute on that ground, would the heir in possession be held by the court to be purged from his irritancy?—Yes, probably he would; there have been cases of that kind in discussion before the court.

Are those all the usual clauses in a deed of Entail, which you have enumerated?—Yes. I do not mean *all* the usual clauses, because a deed of Entail conveys the property under all the technical formalities that are required by the law of Scotland, according to the feudal institutions in conveying land. Those are the clauses peculiarly applicable to a deed of Entail, independent of the necessary clauses for conveying all land.

Is the Committee to understand that the law of Entail, as it at present exists, is founded on the statute of 1685?—It was a disputed point, whether at common law Entails might be executed previous to 1685, and in one case it was the subject of discussion in court, and that case led to the statute. Since that period all Entails have been executed under the statute in order to be effectual.

Is there, so far as you know, any limit yet known to the time for which the will of the entailer may be rendered effectual throughout future ages, provided he conforms to the regulations of that statute?—The persons called by the Entail to the succession under the description of heirs whomsoever of the entailer, that is to say, the last person whom the entailer has described, then succeeds; the property then becomes a property in fee simple in him, the last person whom the entailer has described.

But provided an entailer can anticipate a very extensive series of heirs, can he not enumerate them and render the provisions of his deed effectual against their acts to any extent?—Certainly as far as he can describe them in an intelligible manner.

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Does any power exist in the courts of law in Scotland to modify the will of an entailer, as expressed in his deed, with reference either to the condition of the country or the hardships which it may inflict on each successive generation?—I should apprehend, that the duty of a court of law is to administer the law; and if the deed of Entail becomes the law of the estate, I should think the court must decide according to the provisions and conditions of the deed, if those are distinctly expressed and guarded by the proper irritant and resolutive clauses.

Is the Committee to understand you to mean, that an entailer may regulate the concerns of this world and the administration of property in it for ages subsequent to his own death?—Yes.

You have stated, that the statute of 1685 establishes a record of Entails; can you state from an examination of that record, what has been the progress of the system of Entails since the year 1685 to the present time?—Yes, I can.

Will you make such a statement upon that point as will shew the progressive operation under that Act?—In considering the subject, I found I could not do it well without examining very particularly the record of Entails; and I made an examination which I consider to be accurate, and which I shall now communicate in answer to the question. In order to shew the progress of Entails, I divided the time which has elapsed since 1685, into periods of twenty years; and the following Table shews the progress of Entails:

A number of Deeds recorded in the Register of Entails 28th February 1828.

From	1685	till 1705	- - - - -	79
	1705	- 1725	- - - - -	125
	1725	- 1745	- - - - -	158
	1745	- 1765	- - - - -	138
	1765	- 1785	- - - - -	272
	1785	- 1805	- - - - -	360
	1805	- 1825	- - - - -	467
				1599
From	1st January 1826	till 31st December 1826	- -	27
	1st January 1827	- 31st December 1827	- -	26
	31st December 1827	- 28th February 1828	- -	7
			Making in all - -	1659 Deeds.

But in making this statement I must beg that it is particularly understood and attended to, that I do not by any means intend to say or convey the meaning that there are actually 1659 subsisting Entails. That is the number of deeds on record: several of these are deeds of restriction, partial revocation, alteration, deeds executed in consequence of exchanges made between entailed and unentailed estates; and in such cases the value of the one estate may be supposed to be equivalent to the value of the other given in exchange, and many explanatory deeds. Therefore, in order to avoid the possibility of any misapprehension, I think it right to state distinctly, that the 1659 deeds includes every deed upon the record, although not separate and distinct Entails from those which have been previously executed.

Is there any means of making a calculation of those Entails which have fallen since having been recorded; you say that that calculation does not represent the Entails actually in existence; is there any means of ascertaining the proportion of Entails that have fallen since they were recorded?—I found it perfectly impossible for me as an individual to do it; and I think it extremely difficult for any one to do it, because an Entail is a very intricate deed. Many deeds pass under the name of Entails which may be defeated sometimes with and sometimes without judicial discussion; so that it must be a most laborious undertaking to ascertain what deeds of Entail are really completely effectual, and what are not.

Can you give any idea of the relative quantities of land tied up under strict Entail at the different periods from 1685 down to 1825?—The record of Entails does not afford the means of giving a specific answer to that question, because the description of lands in the cess books, by which alone the relative value of lands can be known to strangers, is very general, and comprehends the lands of *A.* or *B.* under a general description; part of those lands may, and other parts of them may not be entailed, therefore the record of the Entails does not afford the means I apprehend

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of answering that question. But some opinion may be formed from information derived from other sources joined with the evidence which the record of Entails affords; the best information which I have been able to obtain on that subject, I may be allowed to state in the following manner. In the course of his statistical labours Sir John Sinclair has given views upon the subject of Entails prepared from the best information which his extensive correspondence and the general interest excited by his enquiries enabled him to procure; such information may not be perfectly accurate (and he states that it cannot be expected to be so) as the extent of entailed property is constantly varying. But when the statements by Sir John Sinclair are taken in combination with the information which the record of Entails affords, the progress and increase of Entails will appear manifest.

Reflection upon these statements may lead to correct conclusions as to the alarming consequences and the magnitude of the evils which may now be dreaded from the system of entailing.

Sir John Sinclair published in 1814, a General Report of the Agricultural State and Political Circumstances of Scotland as in the year 1811. That Report contains a table stating the valued rent of every county, and the valued rent of estates held under Entail. The valued rent of Scotland is stated to be 3,804,221 *l.* Scots. The valued rent of estates held under Entail is stated to be 1,213,159*l.* 17*s.* 9*d.* Scots; the unentailed valued rent therefore amounts to 2,591,061*l.* 2*s.* 3*d.* Scots. According to this statement, nearly one-third part of the property in Scotland, estimated by its valued rent, was at that period possessed under Entails.

Since the year 1811 there have been 410 deeds put upon the record of Entails. The extent of entailed property has therefore greatly increased since the period when Sir John Sinclair, according to the best information which could be obtained, estimated it at nearly one-third of the whole property of the kingdom.

By computing at a moderate rate the value of properties entailed since 1811, and by taking into view the extent of property conveyed to trustees to be entailed as soon as debts are paid off, and the amount of funds conveyed to trustees for the purpose of purchasing and entailing lands, the conclusion may be drawn that about one half of the territorial property of the kingdom is now or very soon will be, under the fetters of Entail, and the proprietors subjected to all the inconveniences arising from their restricted rights of property, and the hazard and expenses attending judicial discussion for the purpose of rendering effectual or of defeating the settlements of their predecessors.

The general result stated upon the authority of the table prepared by Sir John Sinclair, is supported by the opinion of others.

In 1764 Sir John Dalrymple, through whose influence and by whose exertions the measures proposed by the Faculty of Advocates in 1764 to limit Entails were defeated, stated, in his "Considerations on the Policy of Entails," that the valued rent of the entailed property in Scotland, amounted to about one-fifth of the valuation of the kingdom; and that the entailed lands of Scotland were possessed by about three hundred proprietors.

Dr. Adam Smith, in his "Wealth of Nations," in reprobating the system of entailing, adopted the same estimate.

In the interval between 1764 and 1811 it appears, that 754 deed were recorded in the register of Entails.

These estimates by Sir John Dalrymple in 1764 and Sir John Sinclair in 1811, taken in connection with the number of recorded deeds in the intervening period, support the statement I have made.

In the General Report, published by Sir John Sinclair, the landed proprietors of Scotland are divided into three classes. In the first class are included those whose valued rent exceeds 2,000*l.* Scots, and their number is stated to be 396. In the second class are included those, the valued rent of whose estates is between 500*l.* Scots and 2,000*l.* Scots, and the number of these proprietors is stated to be 1,094. The remaining class whose valued rent does not exceed 500*l.* Scots each, are stated to amount to 6,147.

How have you computed the value of the laws entailed since 1811, at which period you say, according to Sir John Sinclair, about a third of the property was entailed; and according to your calculation it was about one-half?—I could find no particular *data*, but just that the increase of Entails that had taken place might warrant such a conclusion. I do not mean to say that it is an accurate statement.

Do you mean it to be understood that the quantity may either exceed or fall short of one-half?—Certainly, I do not mean it as a specific certain statement.

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Does it follow that all lands that are under Entail in Scotland are recorded?—There may be lands to an extent that it is impossible to ascertain, with regard to which deeds may be presently in subsistence that will bind the parties to entail and to record. Perhaps I may explain myself better by an instance: Suppose I was possessed of a landed estate, and likewise of money, and did not wish to execute an Entail myself, I might execute deeds by which I might bind my heirs or bind any trustees to whom I might convey my whole property, to purchase land, and to execute and to record an Entail affecting both the landed estate conveyed to them and the lands acquired by purchase. The Entail would not be effectual against creditors until the deed is executed and recorded, but at the same time those lands might be placed in a situation that unless attached by creditors they might be held to be entailed; in fact there is a subsisting obligation to entail.

In point of fact, are you aware that large property and funds are tied up under trust for the purpose of being entailed, although those Entails do not at this time appear upon the record?—I have not the least doubt, indeed I know from the general statements that have been made of various settlements, that there are large funds destined to be applied to the purpose of purchasing land for the purpose of entailing; and there are estates of very large value that are conveyed to trustees to pay off debts, and to entail as soon as those debts are paid off.

Do you know this?—I know it from information. The deeds have not passed through my hands; but I know it from information that I cannot doubt.

From report; from whom?—From general statements of family settlements; which of course, I never thought of investigating unless I had a peculiar object to investigate the settlements of individuals.

You could not know it unless they passed through your hands?—I could not know it, with what is called certain legal knowledge.

In your calculation founded on the record of Entails, is there not an inaccuracy arising from some of the Entails appearing as separate, though in fact only relative, that is superseding others, and some extinct by a failure of substitutes and void by forfeiture?—I cannot say so well, that the calculation is inaccurate, as merely that it requires explanation; because it was the only means that I had of giving a statement of the deeds. It would have been a most labourious research to have examined each separate deed, and to have ascertained its validity and effects.

Do you suppose these to be numerous, and which of these three classes to be the most numerous?—As well as I can recollect from the examination I gave, there appeared to me to be about 87 deeds, which were deeds of revocation or alteration from the time when the record was established in 1685, down to December 1825, when I made my first search; but there may have been deeds of exchange which do not exactly appear so, and which are not so easily discoverable, because a deed of exchange goes upon the record, in the same manner as an original deed of Entail.

Is the Committee to understand, that you suppose the relative deeds of Entail to be 87?—I think so.

Have you any means of ascertaining the number of those extinct, by the two other classes?—No, I can have no means of ascertaining it.

Are there not many estates now entailed, and consequently subject to the laws of succession of Entail, which do not appear on the record?—Speaking professionally and technically, I can scarcely say they are entailed; because an estate is not said to be entailed, until the deed is completely and regularly executed and recorded; but I have not the least doubt, that there are a great many subsisting deeds which lay under complete obligation the heirs or trustees or representatives of the persons who have executed those deeds, to make them valid deeds of Entail, which shall bind their posterity.

When an Entail is not recorded, is it in the power of any of the substitutes pointed out in the Entail, to have it recorded by application to the court of Session?—If any deed of Entail has been executed, the substitute of the heir of Entail has an interest in getting it recorded, and may enforce that interest by application to the court.

From the general result of your search, can you state with confidence that the number of original Entails was greater in twenty years, between 1805 and 1825, than in any antecedent period of twenty years?—I think, I can state with confidence that there has been a greater number of Entails recorded.

Of original Entails?—I think I can state with confidence, that there has been

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a greater number of original deeds of Entail recorded between 1805 and 1825, than in any preceding twenty years since 1685.

Can you state in what proportion?—No, I cannot state the proportion exactly; I can state it only so far as it appears from the number of recorded deeds.

Is there any other way of entailing lands, except under the provisions of that statute to which reference has been made; is there any way of entailing by custom?—No.

Do you mean to say, that there are no means of conveying property in trust, so as to approach to what is called an Entail in England, to endure for a definite period?—I certainly do not mean to say that deeds may not be executed in trust, or that such deeds will not be effectual; but they are not Entails.

Is there not a mode of conveying land in life rent as contradistinguished from the conveyance in fee?—Yes, which in fact amounts to a destination of the property for a limited period.

You are now speaking of Scotch Entails?—Yes, I was confining my remarks to Scotch Entails in every expression I made use of.

When you speak of Scotch Entails, you are speaking with reference to the claims of creditors?—Yes, when I use the term Entail I mean a Scotch Entail; I mean an Entail which can be rendered effectual against all the world, by which the heirs of Entail can keep possession of the property so long as they do not disobey the terms of the Entail. The creditors cannot attach that property or estate in any manner or way; they may attach the rents but not the estate.

Are you aware that considerable investments have been made on Scotch property by persons residing in England?—Not from my own personal knowledge, because no such transaction has passed through my hands; but I have understood, from persons upon whose veracity I can rely, and I have no reason to doubt, that English capital has found its way into Scotland, for the purpose of being applied in the purchase of lands in Scotland, and being placed under the fetters of Entail.

Do you consider that the general system of law established, as you have now stated to the Committee, is beneficial to the country?—Quite the reverse.

Do you consider that it is otherwise than beneficial to the public and society at large, independent of the interests of individuals?—I think it is prejudicial to the interests of the country.

State to the Committee the grounds on which you entertain that opinion?—By Entails a perpetuity of *life rents* is created, and all the heirs of Entail are restricted in the administration and beneficial use and possession of the estate, and deprived of the credit which the possession of property in land confers on all other classes of men.

Is entailed property in general administered by the persons in possession for the time being, in the same manner as fee-simple property is?—It sometimes happens, that entailed proprietors have other resources than the entailed estate; in such cases they may have the command of money, and apply it in the same manner as other proprietors would do; but in general where the property of the entailed proprietor is confined to his entailed estate, I think it is a matter of impossibility, that that estate can be expected to be managed so well or beneficially, either for the interest of the country or for the interest of the succeeding heir as other estates are, where the proprietor can command credit upon securities to be granted upon his estate.

When an individual succeeds to an entailed estate, is it not a common thing that his first endeavour is to discover a flaw or imperfection in the deed which imposes fetters on the administration of the property?—I cannot say that it is so in every case, but when the inconvenience of the Entail comes to be felt, then naturally he has recourse to professional assistance to endeavour to remove those inconveniences, if within his power.

Is it considered, that the restriction imposed by an Entail must be interpreted in the most strict manner, and that nothing is to go by implication to support the deed?—Yes, it is; and the uniform principle which for many years seemed to prevail in the court of Session was, that in every case and in every instance in which the prohibition was not quite distinctly marked, that nothing could be inferred or carried by implication, so as to give effect to a meaning of the Entailer, however obvious, if it was not expressed; but, I believe, a considerable change has now taken place in the principle upon which it is thought the interpretation of Entails should depend, and, I believe, chiefly from the judgments that have been pronounced in the House of Lords; and the principle seems now to be established,

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that an Entail like every other deed should have a fair interpretation where the meaning of the deed can be ascertained without doubt.

Has a considerable uncertainty in the law prevailed, so as to place Entailed proprietors in very difficult circumstances as to knowing what they can and what they cannot do according to law in the administration of their property?—In a great many cases, there is, perhaps, no branch of our law in which there has been so much litigation, and so much change of opinion and fluctuation at different periods as in the law of Entail.

Is it, therefore, very difficult for an entailed proprietor to obtain from his legal adviser, opinions upon which he can safely rely in the conduct of his affairs?—In many cases a double difficulty arises; in the first place, the conveyance of all landed property in Scotland is made under the forms which prevailed in feudal times, and the vestiges of which still remain. The forms of conveying landed property give rise of themselves to a great many perplexing and intricate questions, and the law of Entail leads to a great many additional questions; because there is a double difficulty to be encountered. There is, in the first place, the interpretation of a deed, so far as regards the conveyance of property independent of the Entail, and then the additional difficulties arising from the Entail, being joined in the deed in addition to the other intricacies in the forms of feudal conveyances.

Do not considerable difficulties and uncertainty prevail as to the powers of letting land in lease?—That has been the subject of frequent discussion. Formerly the court went into the idea which I alluded to before, which was, that if there was no limitation in the Entail, with regard to letting leases, then it was in the power of every Entail proprietor to let leases for such endurances as he thought proper. By recent judgments of the House of Lords, the principle is now established, that a lease of longer than usual endurance is, in fact, an alienation, and falls under that clause of the deed which prohibits alienation.

What is a lease of usual endurance; what is the term of years which may constitute a lease of usual endurance; the extreme term?—There have been differences of opinion upon that point. I think I have a note here of some of the judgments of the court, if I may be allowed to refer to it; it has been decided that a lease of fifty-seven years is an alienation; it has likewise been decided that a lease for thirty-one years may be set aside as an alienation; the court has sustained a lease for the marked endurance of twenty-one years, in a case in which it was provided that it should endure for twenty-nine, twenty-seven, twenty-five, twenty-one or nineteen years, for whichever of these terms the court of Session or the House of Lords should find to be the longest period that the heir in possession had power to grant the lease.

Were those terms in the original Entail?—There had been no clause in the original Entail fixing the period for which the lease might be granted.

Is it the terms of the lease or the terms of the Entail, in the case which provided that it should endure for varying terms or for such term as the court of Session or House of Lords should find to be the longest period that the heir had power to grant?—That was in the lease.

Then the terms of the lease actually provided the necessity of an appeal to the House of Lords, to ascertain what was the longest term the law would allow?—The proprietor seems to have considered it a matter of doubt for what period of time he could in safety grant a lease; he wished to grant a lease for as long a period as the law would sustain, and he therefore granted his lease for the longest period which he thought he might; but in case that should be a longer period than the court would sustain, he diminishes the period, and gives such period as the court should think he had power.

Leaving the necessity of an appeal to the House of Lords to decide what that period is?—To the court of Session, and then if the parties are dissatisfied, to the House of Lords.

Now, what will be held to be an alienation by a lease under the terms of the statute of 1685, where a party wishes to grant the longest lease the law will allow; is he obliged in the terms of it to insert the alternative, such a fixed term or such term the longest that the court of Session or the House of Lords will allow?—I can only say, that in that particular case, such seems to be the opinion of the proprietors.

Now, is there any thing in the statute of 1685 about the power of leasing?—No.

Is there any thing in any other Act about the power of leasing?—No.

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Then this case arose from the fancy of a man trying the greatest number of years he could grant?—By the law as it was understood originally, if the deed of Entail contained no restriction against letting leases, a man might then grant a lease for three hundred years, if he chose.

Has not the decision of the House of Lords in the Queensberry case, reversed the decision put on the term *dispone* by the court below, as late as the year 1815, in the case of Hamilton *versus* M^c^Dowall, where a lease for three hundred years was held as not contravening the term dispone?—In the case of Hamilton *versus* M^c^Dowall, the second division of the court held that a prohibition against disponing was not equivalent to a prohibition against alienating, and a lease for three hundred years was sustained, notwithstanding the prohibition in the Entail against disponing; by the judgment of the House of Lords, in the case of the Queensberry leases, it now seems a settled point that the word "*disponed*" has a meaning equivalent to the word alienate, and a lease for fifty-seven years accordingly was held to fall under a prohibition against disponing.

Was it not the rule of law in Scotland previous to those decisions in the Queensberry cases, that the heir in tail in possession in Scotland might do any act he was not prohibited from doing by the deed of Entail?—I think I formerly mentioned, that the principle upon which the court of Session decided was, that the condition of the Entail should not in any way be extended by inference or implication, and therefore that the heir of Entail in possession might do any act not expressly prohibited.

Then the rule laid down by the House of Lords in those cases, has restricted that power of alienation?—As I understand the principle which has been now given effect to in the House of Lords, it is that an Entail, like every other deed, is to receive the fair construction of its fair meaning, and if its fair meaning can be established, that effect is to be given to it; and if any consequences arise from the law, prejudicial to the interests of the country, the remedy should be legislative, and not judicial.

Then the result of those decisions is, that the powers of heirs of Entail in possession, are more limited now than they were understood to be previous to those decisions of the House of Lords?—Certainly they are more limited; it is a necessary consequence from my previous answers.

Since the decisions of the Queensberry cases, has not the court of Session decided in Stirling and Walker's, that thirty-one years lease is to be considered an alienation?—It has.

Then fifty-seven years in the Queensberry cases, being decided by the House of Lords to be an alienation, and the court of Session having decided that thirty-one years is an alienation; is the term now fixed in Scotland, which is not under an Entail, held to be an alienation, or is it yet matter of doubt?—I am not aware that it is exactly fixed.

Now, do you consider that twenty-one years is the limit; suppose you were called upon to advise upon a deed of Entail, and the acts done under that deed, would you say that twenty-one years constituted the extreme period?—The usual period for letting leases in Scotland is nineteen years, unless where under the peculiar situation of the property, a longer lease is thought necessary to give encouragement to a tenant for laying out money in the course of the lease; nineteen years, I believe, is the usual endurance in Scotland.

But have not the courts decided that twenty-one years is not an alienation?—I am not sure at present.

Was it not decided by the first division of the court of Session on the 12th of June 1822, that a lease for twenty-one years was not an alienation?—I believe it was.

Then there is a period between thirty-one and twenty-one as to which it is still doubtful whether it is an alienation or no?—I believe that is the result.

However, the law is still uncertain in Scotland as to what is an alienation?—Yes.

Thirty-one years has been decided to be an alienation, twenty-one years has been decided to be not an alienation; and there is a floating period upon which it is still doubtful?—Yes.

Did you say twenty-one years had been decided not to be an alienation, or that it was still doubtful?—What I meant to say, was that nineteen years is the usual endurance in Scotland; but if the decision of the court of Scotland was twenty-one years, that is another question.

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Was it not decided that twenty-one years was not an alienation?—I believe it was.

You have said, that the tendency of the strictness of the law of entailing in Scotland, led the courts there, to give a lax interpretation to a deed of Entail, whereas a strict and literal one has been put upon this instrument in the House of Lords; is it the practice of the courts there, to give a liberal construction to deeds of Entail?—I call it a strict not a lax interpretation, in this view that the court of Session never went one iota beyond the exact terms of the expressions in the deed of Entail.

You have said that the effect of the law of Scotland, such as it is, exposed the construction of deeds to two interpretations, which were varying in the court of Session below, and in the House of Lords; explain to the Committee what that variation was?—The court of Session acting under the impression, that deeds of Entail were of an unfavourable nature, uniformly felt themselves called upon to interpret them strictly, as we call it in Scotland, that is to say, in no one particular wishing to exceed, in the slightest degree, the express terms of the prohibition. That we call a strict interpretation, because taking it in this view, that although the deed may convey the meaning, that it was the intention of the Entailer to prohibit something, still if he has not actually prohibited it, the court of Session in that way allowed the heir of the Entail to escape from that fetter. But in the House of Lords, rather a different view has been taken of the case; and it has been this, as I understand it, that in every case, if you can gather from the deed, the fair meaning of what the entailer intended, that you give effect to that meaning just as all other deeds are interpreted, even although the expressions may not be so completely strong and decided as the court of Session was in the habit of requiring.

Has not this varying construction produced great uncertainty, and very extensive litigation?—Certainly.

But this varying construction is now settled by the law?—As far as I know at present.

You said something of a system of purchase arising in Scotland, different from what there is in England, with a view to strict Entail; if such a system became frequent would it not inflict on Scotland all the evils of absentee landlords?—Certainly.

Is there any statute subsequent to that in the year 1685, which affects the law of Entail?—There are two subsequent statutes.

What is the first?—The 10th of George the Third, chapter 51, in the year 1770.

What is the object of that statute?—The object of the statute perhaps may be explained by its preamble. The preamble of it is in these words (after reciting the statute passed in the year 1685) "And whereas many tallies of lands and estates in "Scotland, made as well before as after the passing the said Act, do contain clauses "limiting the heirs of Entail from granting tacks or leases of a longer endurance "than their own lives, or for a small number of years only, whereby the cultivation "of land in that part of this kingdom is greatly obstructed, and mischief arises to "the public; and which must daily increase so long as the law allowing such "Entails subsists, if some remedy be not provided."

What powers does this Act confer upon heirs of Entail?—In the first place, it confers powers to grant tacks for fourteen years and one existing life.

What is the meaning of the word tack?—Lease, or for two lives and the life of one survivor, or for thirty-one years, provided that certain specified improvements are to be made by the tenant during the lease. The Act likewise provides, that building leases may be granted for ninety-nine years; but it contains restrictions which I believe have rendered this provision in the Act, if not altogether unavailing, at least it has been acted upon to a very limited extent.

Which provision do you mean, that as to the building lease, or the general provision?—I mean that provision with regard to granting leases for 99 years. The provisions are, that not more than five acres shall be granted to any one person, either in his own name or to any other person or persons in trust for him, and that every such lease shall contain a condition, that the lease shall be void if one dwelling-house at least not under the value of 10*l.* sterling shall not be built within the space of ten years from the date of the lease for each one half acre of ground comprehended in the lease, and that the said houses shall be kept in good, tenantable and sufficient repair. The difficulty in the first place, which meets one in acting upon that part of the statute is, that if the lease should extend to 20 or 30 acres, it would probably meet

meet the views of the tenant to build his houses upon some one particular spot, but not to extend them over each half acre, so as to have something built upon each. In its practical operation it is attended with another effect; we are not accustomed in Scotland to leasehold property; I may rather say that there is a prejudice or a feeling against it; and one objection to it is, that if the property is conveyed in the ordinary way, it affords the means of borrowing money upon it, and the records afford such means of safety that every person who has purchased a property can be at no loss to borrow money upon the security of that property to a certain extent. But the leasehold property does not afford the means of borrowing money upon it; and the general feeling is, that one does not wish to lay out money in building houses which are to revert to the proprietor at a limited period; in perhaps 99 years.

Now state the other provisions of the statute?—The statute then provides, that the lease shall not be granted for less rent than was payable for the last lease. The statute then provides, that the proprietor laying out money for improvement of estates, shall be a creditor to the succeeding heirs for three-fourths thereof.

Of the rent?—No; three-fourths of the sum laid out in improvements, provided the same does not exceed four years rent after deductions of burdens, &c. The statute provides, that the proprietor intending to lay out money on improvements, shall, three months at least before he begins to execute the same, give notice in writing to the heir of entail next entitled to succeed to the estate after the heirs of the body of the said proprietor, specifying in such notice the kind of improvement intended, and the farms or parts of the estate upon which the improvements are intended to be made. It makes a provision for recording these statements. It likewise provides, that the proprietor laying out money as aforesaid with an intent of being a creditor to the succeeding heirs of Entail in the manner above expressed, shall annually, during the making of such improvements, within the space of four months after the term of Martinmas, lodge with the sheriff or steward clerk of the county within which the lands are situated, an account of the money expended by him in such improvements during the twelvemonth preceding that term of Martinmas, subscribed by him. The Act provides, that the heir sued for money due for improvements, may be discharged on conveying to creditors one third part of the clear rents of the entailed estate. The statute then provides, that the heir in possession who lays out money in building a mansion house or offices, or in repairing or adding to the mansion house or offices upon his estate, shall be a creditor to the next succeeding heir of Entail for three fourth parts of the money expended by him. Similar provisions are made with regard to the terms necessary to be observed in making this a burthen upon the entailed estate and future heirs. The statute then confers powers upon entailed proprietors to exchange lands to a certain limited extent, and points out the mode of ascertaining the value of lands to be exchanged.

Has any subsequent statute passed, which affects the law of Entail in Scotland?—Yes, I believe, there are many local Acts.

No, but public statutes?—There is the General Turnpike Act, the 59th of George the Third, chapter 61.

What are the provisions of that statute, so far as they affect the law of Entails?—Provisions are made, by which entailed proprietors may burthen the estates to the extent of one year's rent, for making Turnpike Roads.

Was there not a statute passed on the 20th of George the Second, enabling heirs of Entail to sell superiority?—Yes, there was. There is another statute, in which heirs of Entail are affected. I mean the Land Tax Act. A statute was passed, I think, in the year 1797, for the purpose of allowing proprietors of land to purchase the Land Tax. And that statute contains provisions by which entailed proprietors may sell part of the entailed estate, to be applied for the purpose of purchasing the Land Tax, under the authority of the court of Session.

What statute was that?—It was in 1797 or 1798.

The 20th of George the Second, limits the power of sale of superiority to vassals?—To the vassals of the superior.

Has any subsequent general statute been passed, affecting the law of Entail and the powers of heirs of Entail?—Yes.

What is the date of that?—The 21st of June 1824.

State what the preamble of that statute is?—The 5th of George the 4th, chapter 87. After reciting the statute in 1685, it proceeds, "And whereas by an Act of "Parliament passed in the tenth year of the reign of his late Majesty King George "the Third, intituled, 'An Act to encourage the improvement of lands, tenements "and hereditaments, in that part of Great Britain called Scotland, held under

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" settlement of strict Entail;' the proprietors of entailed estates in Scotland were " empowered to burthen their estates and the subsequent heirs of Entail, for the " improvement of their entailed estates, in manner specified in that Act: And " whereas sundry Entails of lands and estates in Scotland, contain no powers in " regard to the granting of provisions to the wives or husbands and children of the " proprietors thereof; and in many other Entails by reason of the change in the " value of money, the improved value of lands and estates in Scotland, and other " causes, the powers of granting provisions to the wives or husbands and children " of the proprietors of such entailed estates, have become entirely inadequate for " those purposes; and it has become expedient that the powers of granting such " provisions should be conferred or enlarged, as the case may be, under certain " regulations and conditions in all Entails already made or hereafter to be made."

Inform the Committee what special provisions are made by this Act?—That it shall be lawful to every heir of Entail in possession to provide and infeft his wife in a life-rent provision out of his entailed land and estates by way of annuity: Provided always, that such annuity shall not exceed one-third part of the free yearly rent of the said lands and estates, where the same shall be let, or of the free yearly value thereof where the same shall not be let; after deducting public burthens, life-rent provisions, yearly interest of debts and provisions, including the interest of provisions to children specified in the Act; and the yearly rent of other burthens affecting the estate. The next is a provision to be granted to husbands by an heiress; that it shall be lawful to every heir female in possession to provide and infeft her husband in a life-rent provision, provided that such annuity shall not in any case exceed one-half of the free yearly rent, or free yearly value as aforesaid. In case the lands and estates shall be already burthened with a prior existing annuity granted to a wife or husband under the authority of this Act, the annuity to be granted to a husband in the manner before mentioned, shall not exceed one-third part of the same; and that only two life-rent provisions shall subsist at one time. The statute then provides, that the heirs of Entail may grant provisions to children, provided that the amount of such provision shall in no case exceed the proportion following, of the free yearly rents or free yearly value of the whole of the said entailed lands and estates, after deducting public burdens, life-rent provisions, including those to wives or husbands as aforesaid, to be granted by the Act, the yearly interest of debts and provisions, and the yearly amount of other burthens affecting or burthening the entailed lands. The amount of provisions allowed by the Act is, for one child one year's free-rent or value, for two children two years' free-rent or value, and for three or more children three years' free rent or value. After the death of the grantor, it is provided, that the heir succeeding to the estate shall make payment of the provisions with interest. And it is enacted, that the heir sued for provisions to children, shall be discharged on conveying one-third part of the clear rents of the estate. It is likewise enacted, that the heir in possession shall not be deprived of more than two-third parts of the clear annual income of the entailed estate, under the provisions of the Act in 1770 and the provisions of this Act.

Was there not an Act passed in 1690, declaring that Entails should be good against forfeiture, carrying further the principles of the Bill of 1685?—That is to say, that by treason the heirs of Entail should only forfeit the life-rent and not the fee.

Was there not an Act passed after the Union in the 7th of Anne, extending the principles of forfeiture for treason and misprision of treason?—Yes, placing the law on the same footing as in England.

Was there not an Act in the year 1747, abolishing heritable jurisdictions in Scotland?—Yes.

Were not many of those heritable jurisdictions entailed?—It does not appear, as far as I have had access, how many were entailed. It appears, however, that there were five petitions presented to the court of Session on the part of substitute heirs of Entail, for the purpose of having the sums allowed as compensation in the place of the heritable jurisdictions, lodged in one of the banks of Scotland, until it was settled upon the heirs of the Entail in the terms of the statute, and of their respective Entails.

Give the Committee your opinion what is the extent of years that a proprietor entailed, may lease his lands or part of his lands for?—Unless for that decision, I should not have thought it safe to recommend above nineteen years; but when there is a decision of the supreme court finding that a lease for twenty-one years is valid, I should think it myself safe to trust that the court would not depart from a decision upon such a point.

Then

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Then do you conceive, that that proviso in the remedial statute of the 10th of George the Third, is inoperative and of no effect as to the leasing term of twenty-one years?—I do not know any instance in which it has been acted upon.

You said there was a judgment of the House of Lords upon the subject?—That was under the statute of 1685, not under the remedial Act.

But the remedial Act contains an express proviso, giving the tenant full power of tacking his lands for thirty-one years?—Yes; the statute provides, that every such lease for two lives, or for any term of years exceeding nineteen, shall contain clauses obliging the tenant or tenants to make improvements by inclosing, &c. as therein specified, and to keep and preserve the fences when made, in good and sufficient repair during the lease, and to leave them so at the expiration thereof; and that no inclosures which shall be made, shall comprehend more than forty acres in one field, excepting where the land consists of hills or other ground incapable or improper in its nature for culture by the plough, in which case the inclosure may be made of such extent as the nature of the ground shall require. Therefore I apprehend, that leases granted under this provision of the statute, are leases that must be granted under the whole terms of it; and as far as I have understood, I am not aware of any one lease that has been granted upon it. There may have been though they have not fallen within my knowledge.

You are not aware of any lease having been granted, requiring all the conditions of those clauses?—No; none have fallen under my experience.

From what circumstance does it happen, that no lease has been granted under those clauses; for what reason?—I do not know that I can well assign the reason. There is one reason that operates against every proceeding under the statute, that a great many technical formalities are required, and unless all these formalities are complied with, and strictly and literally fulfilled, it opens a door to the setting aside of the whole transaction.

Within your knowledge or experience, was there ever any attempt at an application to the legislature, to remedy those grievances which you state as unaffected by the provisions of that statute as to the leases?—Yes, there was.

When?—About 1764, soon after the passing one of the Acts, the Jurisdiction Act in 1747, which have been referred to.

But subsequently to that statute, did you ever, within your knowledge or experience, hear or know of any intended application to the legislature, to remedy the grievances of the statute of 1770?—I do not remember any application with regard to that clause in particular. There have been from time to time meetings of entailed proprietors to obtain alterations generally in the law, but I cannot call to mind any meeting relative to that particular object.

Then in point of fact, it would appear, according to your opinion, to be almost tantamount to an impossibility, to tack lands for the period of thirty-one years; you say there are difficulties in it?—The difficulties that I allude to are more to the provisions of the statute generally; to the whole provisions of the statute.

But still you have stated, that you do not know of any one instance within your own knowledge or experience, where lands have been let for thirty-one years under that statute?—No, I do not for thirty-one years; I know instances where there have been lands let for ninety-nine years under the other provisions of the clauses in the Act for granting building leases.

Have you ever heard of any intention on the part of Entail proprietors, to apply to the legislature to remedy the difficulties which exist in putting the clauses of the Act of 1770 into operation?—I am not aware of any meeting of Entail proprietors for that special purpose. I am perfectly aware of many meetings of entailed proprietors, for the purpose of removing generally the restrictions imposed by the law of Entail; but I do not know of any meeting connected with that one particular point of granting leases for thirty-one years. I attended various meetings of a committee appointed by entailed proprietors, and so little was this clause thought of, that to the best of my recollection, their attention was never particularly called to it upon any one occasion. All the provisions of the Act of 1685, the other provisions of the remedial statute in 1770, and of the statute in 1824, were very fully and completely discussed, but this particular clause was never the subject of conversation, as far as I can recollect.

Then do you know that any application was thought of to the legislature?—Not as to that particular clause.

Is it not a rare occurrence in Scotland that a lease should be drawn up and signed by the two parties?—Leases are always signed by both parties.

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Well, but do you know persons in Scotland possessing farms to a large extent, that have never signed the lease?—The practice in Scotland in granting leases is perhaps a little loose.

There is another paper which is called A Missive; does that bind the parties equally as the lease?—I will tell the Committee the distinction, as far as I understand it: if the proprietor and the tenant exchange missive letters, those letters would not be binding as a lease unless possession has followed upon it, but if possession follows upon those letters, and their meaning is intelligibly though not formally expressed, and there is what is termed in the law of Scotland, a *rei interventus*, that is to say, the proprietor allows the tenant to take possession, and the tenant commences to cultivate or to alter the state of the farm, then the missive letters would be held, and I believe have been held to be valid as a lease.

Is there not a valuable stamp upon the lease?—That can be got over, because the missive letters can be stamped in the course of any legal procedure.

Explain to the Committee the nature and import of these missive letters; what is the difference between missive letters and a lease?—A missive letter may consist of a very few lines. The one party states in a letter the terms of the agreement, mentioning the amount of rent, endurance of the lease, and any other conditions agreed upon; the other party accepts the offer. The tenant enters into possession; and these missive letters exchanged between the parties would be sufficient to prove the bargain between them.

Is there any record of a lease in that form?—None is necessary.

A missive letter only contains an obligation to grant a lease?—Yes; but still they are valid, even though the lease be not granted when followed by possession.

But would they be binding on the heir in tail succeeding to the property, though the missive letters were granted by a previous heir, if in contravention to the statute of 1685?—They would not be binding on the heir.

But would they be binding supposing they were not a contravention of the Entail?—Yes, they would be binding upon the heir.

If they were not a contravention of the Entail?—If they were not a contravention of the Entail, I presume the entailed proprietor would be in the same situation as any other.

But would they bind the heir in tail succeeding equally as a regular lease; is it not a personal obligation; if there was that *rei interventus*, of which you have spoken, would it bind the heir in tail?—I think there may be some doubts with regard to that.

You stated there were several local Acts that enabled heirs of Entail in possession to charge the estates in addition to these general statutes; do you know of any of those, and what the reason for passing them was?—I believe in almost all the local statutes, at least in a great many, there are provisions by which the heirs of Entail are allowed to concur for some public or some beneficial purpose.

What, to charge their estates in addition to those charges they may make under the general laws?—Under these two remedial laws the heir of Entail is entitled to give up his two-thirds of the rents of the estate, and to retain one-third; but the provisions in these Acts apply only to those particular provisions that fall under these Acts, so that the other Acts affecting entailed proprietors may still lead to an additional charge against the heir. The Turnpike Act, for instance, allows an addition also of one year's rent: now I apprehend that this forms an addition to the sums that the heir of Entail may lay upon the subsequent heirs. There is, in the first place, the four years rent for improvement, the two years rent for building a mansion house and offices, then the provisions under Lord Aberdeen's Act. The terms of this Act are, that the powers given and granted by the said recited Act of the 10th of the reign of his late Majesty, shall in no case be exercised to such an extent as to deprive the person in possession of the entailed lands in Scotland, of more than two-third parts of the free yearly rent or produce of the same. Now I apprehend that applies only to these two Acts, so that under the Turnpike Act, the substitute heir in possession may still have an additional claim upon his one remaining third of the rents of the estates.

Having now stated to the Committee very fully the state of the law with regard to Entails in Scotland, state whether you think, under the existing law as it has been and as it is now, that large portions of Scotland are in a much less improved state than if those parts had not been under the fetters of Entail, either under the Act of 1685 or the subsequent statutes affecting that law?—Certainly; I can have no hesitation in thinking, that Scotland would have been in a much more improved

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condition, if Entails had not been executed under the Act of 1685; because the limitations under which proprietors possess their property, in many instances almost precludes the possibility of their improving them in the same manner that they would do, if their credit was not limited by the operation of the deed under which they possess their property.

In consequence of that opinion, do you also think that, under a different state of law, a very large amount of population might have been beneficially employed in improvements, which have not taken place?—I think that a great many of the entailed proprietors of Scotland, if they had possessed their estates in fee-simple, with all the command of money and credit which such possessions would have given them, would have improved their estates much more than they have done under their entailed possessions.

Does it follow, from that state of the case, that a great deal of wealth might have been produced, which is at present dormant, and that there are great resources in the land of Scotland which are at present totally unproductive?—I believe many entailed estates would be very greatly improved if the proprietors were relieved from the fetters of the Entail.

But do you not believe that such improvements would add to the general wealth of the country, as well as to the benefit of individuals?—Whatever confers benefit upon individuals, and increases and improves their condition, must I apprehend improve the general wealth of the community. The wealth of the community is formed of component parts, being the aggregate wealth of individuals.

Do you consider that a very large amount of capital might be employed, so beneficially upon lands which are now under Entail in Scotland, as to confer great additional wealth upon the heirs destined to succeed to those properties?—I think that in most cases the lands would be improved, and of course the heir succeeding to an estate derives benefit or sustains loss from succeeding to an estate in an improved or in a neglected condition.

Is the Committee to understand, that there might be improvements made conferring great permanent benefit upon estates; not mere fanciful improvements for the pleasure of the present owner?—Certainly; I conceive that the restrictions imposed by Entails tend very strongly to prevent improvements; consequently, if these restrictions were removed the improvements would take place, which are precluded by the operation of the Entail law.

Do you offer this opinion to the Committee, bearing in mind the supposed facility for improvements which the Act of the 10th of George the Third confers?—Yes; I do not conceive that the 10th of George the Third removes, in any very great degree, the obstructions to improvements occasioned by the statute in 1685. It does give, to a limited extent, but not to a very great extent, the means of improving the property.

Is the Committee generally to understand, that you think the law of Entail, as existing at this moment, presents great impediments to the improvement of Scotland?—Certainly; I cannot pretend to form the opinion from my own personal knowledge, because as I do not know Scotland so well, (the country in general,) as to have had an opportunity of judging; and if I had that opportunity, I am not sufficiently acquainted with agricultural operations to form an opinion. But I have understood that land surveyors and men who have been in the habit of paying particular attention to the state and condition of property, could in many districts of Scotland distinguish, without knowing any thing of it but from the appearance of the country, the entailed from the unentailed property.

Do you consider, with reference to individuals (I mean members of the same family,) that Entails are, on the whole, advantageous?—I consider them to be extremely disadvantageous.

Does the system of Entail lead to cordiality between the members of the same family?—The system of Entails puts the eldest son, the heir of Entail, to a certain extent (unless so far as he is guided by good feeling and proper sentiment) beyond the control of his father. He knows his father cannot disappoint him; he may make his situation a little worse by neglecting, by dilapidating the estate, but he perhaps cannot make him much worse, and he knows he must succeed to the estate afterwards.

Is it in the power of a father, however well-disposed towards his son, to enable that son to marry, by making a suitable or reasonable settlement, with reference to that event, under the entailed law?—He may concur with his son in marriage set-

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tlements, and the settlement will be effectual in so far as there are means out of the entailed estate to render them binding.

But do you mean to say that any possessor of an entailed estate has, in contemplation of his son's marriage, the power to charge that estate or to put it into settlement with reference to that event, or the issue which may arise from such marriage?—He may grant an obligation, or concur in an obligation with his son, and that obligation may be made effectual when the son comes to succeed to the entailed estate; but if the son was to die before the father, of course it must fall to the ground, as he never was in possession.

Is, then, the Committee to understand that in the event of a son marrying, and pre-deceasing his father, there is no possibility of rendering any settlement, made in contemplation of the son's marriage, available to the widow or the issue of that son?—Not out of the entailed estate.

Then there is no power of mutual accommodation between father and son in the law of Entail in Scotland contingent upon the son's marriage, similar to that which exists in the law of England?—I am not exactly sure that I understand the law of England so well as to give an answer by reference to it.

Does it not frequently happen, when the proprietor of an entailed estate may have got into difficulty in his affairs, that he is joined by his son in raising money on their joint life-rent interest?—There are frequent instances of such occurrences; and instances by which the son of an Entail proprietor has, within a very short period after he has become of age, so involved himself in obligations with his father for sums which were advanced and divided between them to supply their mutual expenses and wants, that the son, after his attaining the age of twenty-one, has been involved to an extent, that the life-interest of that son might be almost said to cease in the estate.

But do not cases of that description arise, when they are not intended for the benefit of the son, but merely to accommodate the father for the time being?—It may be in that way, or it may be as matter of mutual accommodation. Probably the son, when he joins in obligation, may perhaps require that he should have a part of the sum for his own purposes.

May not such practices, however becoming on the part of the son, lead to inevitable suffering on his part?—Surely; because when he enters into possession of the estate, instead of entering into possession of an estate of a certain rental, he enters into possession under the burthen of all those obligations which have been previously granted, and which, although they cannot be made effectual against the estate itself, can be made effectual against the rents of the estate during his possession.

Under the statute of 1685, does not an estate frequently go to distant male relations, the heirs female of the last heir in possession remaining in poverty?—I have known instances certainly of very distressing occurrences in that way; of females—of daughters, when the estate has been possessed by their father and brother; and upon the death of their brother the succession devolves upon some distant connection, and they are left with comparatively a very scanty provision which the father or brother may have been enabled to save.

Are there not many instances of persons having been desirous to do justice to their estate, and yet possessing no means so to do in respect of improvements, having involved themselves deeply; and yet while they have greatly increased the value of the estate, they have had no power of relief against the estate, which descends with greatly increased value to the heir of the Entail?—Every Entail proprietor stands in that situation in so far as regards the estate; if he lays out his money upon the estate, he may create a burthen upon the estate to the extent mentioned in the remedial statute of 1770; but if he does not do so, whatever money he has laid out upon the improvement of his estate must go for the benefit of the succeeding heir, and that heir is certainly not liable to repay any part of the sums so expended.

Has there arisen on the law of Entail generally, a very great extent of important and difficult litigation?—More I believe than in any branch of the law of Scotland; and I believe that a greater extent of property has been involved in the legal discussions which have arisen out of it, than from any other branch of law that can be stated.

Has such litigation existed in the supreme court of Scotland only; or has it occupied a very large portion of the time of the supreme appellate jurisdiction of the

the House of Lords.—Almost every case of importance has gone to the House of Lords.

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And consequently a very large part of the time occupied both by the court below and the House of Lords, has been occupied on the subject of the Entail law?—Certainly it forms a very large part of the reported decisions of the courts of the country.

Can you state any thing of the proportion which the cases under the law of Entail in the courts of Scotland bear to other subjects of litigation in the court of Session?—I can state it pretty accurately since 12th May 1821. The reason that I fix upon that period is, that until that period there was no reported collection of the decisions of the court, but those reported by the collectors named by the faculty of advocates; in that publication of advocates and in the collection by the faculty of advocates there were a great many cases, and some of very great importance, which are not reported at all. In May 1821 Mr. Shaw, an advocate, commenced a statement of all the cases that occurred in the court of Session, giving a general summary of all litigated cases, and I can state the number of those cases.

Give the Committee the result?—The result is, that from the 12th of May 1821, when that collection of decisions commences, until the 21st of December 1827, when it terminates, there have been decided in the court of Session sixty-three cases, arising immediately and directly out of the statutes of 1685 and of 1824; these cases arise directly and immediately out of the statutes. There must have been a great many decisions arising consequentially out of these cases, in this manner; supppose in the Queensberry or other cases, a great many leases were brought under reduction, and it was declared that these leases were not valid, that decision upon the law of Entail would be one case falling immediately under the statute; consequential claims then remained as a subject of discussion between the tenants whose leases had been set aside, and the executors or representatives other than the heir of Entail.

Has any statement of the number of such cases come under your consideration?—No, it has not; it would be extremely difficult to make a statement of consequential cases.

Can you state what is the total number of cases that have been decided by the court of Session between the periods you mentioned?—Yes, I can; the total number is 2,881.

Since when?—Since the 12th of May 1821; I mean with reference to the Reports by Shaw, that is the number reported.

Do you imagine that the cases under the Entail law, occupied more than the proportion of time occupied in other cases?—They were generally of a very intricate and perplexing nature, and many of them of very great importance; they therefore received a great deal of attention, and the time that they occupied must have been more than in cases less perplexing and intricate.

Do you mean in the enumeration of 2,881 cases, that those comprize all cases even of the most trivial description?—All the cases, I apprehend, that have fallen under judicial discussion.—I do not mean that it includes those in which the court acts in its ministerial capacity, but all disputed cases.

Do you believe, that after all the extent of important litigation which has taken place, that the law is now so unsettled as to render a great diminution of litigation likely from this time forward under the law of Entail?—It is extremely difficult to say when the law is settled, because upon some points the law was perfectly understood to be settled some years ago; but now different principles and views prevail, and we do not know whether in some years hence, other views may not be taken to them.

Do you imagine that the most eminent practitioners in the law of Scotland at this moment can give positive and distinct opinions to parties desirous to act under the law, so that they may insure a conformity and compliance with it?—They may give opinions certainly, as they have done before, but, just as they have done before, those opinions may not always be right. I may explain perhaps a little; I think I may safely say that for a good many years there is scarcely a lawyer who would not have given the opinion, that if there was no prohibition in the Entail, leases for any length of endurance might be granted; now, no lawyer could give that opinion certainly; about the same period, I may likewise say, that there is no lawyer who would not have given an opinion that *grassums* (*fines*, I believe, in England they call them,) might be taken by heirs of Entail letting their lands, unless such grassums or fines were prohibited strictly by the terms of the Entail;

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I believe that lawyers would have given that opinion, and I believe lawyers recommended it upon this footing, that it gave the person in possession the means of providing for his younger family which he had not otherwise, and therefore it was a very common practice, upon the renewal of leases, to take grassums or fines. Now the views are perfectly different, and the judgment in the court of last record has been, that he can do no such thing; perhaps, I may likewise mention another point upon which there has been a little litigation, and which has been used as a means of defeating Entails after they had subsisted for a considerable time; one of the clauses of the Entail which I mentioned, was a clause prohibiting an alteration of a particular order of succession; in some Entails that clause has either been altogether omitted or has been imperfectly expressed; I believe, for many years it was not considered of such material importance, because certainly if you are prevented from selling, you are prevented from altering the order of succession, as a sale necessarily alters the order of succession. This defect has been within these few years observed in several instances, and it now seems a decided point, that if there is not an express prohibition against altering the order of succession, a person in possession of an entailed estate may, after he has completed his title under the Entail, convey to himself and his heirs or assignees in fee simple; a title may be completed under such conveyance, and the Entail may be thus defeated; for a great many years no such thing was thought of. The clauses in Entails are extremely complicated and intricate; there may be various modes of defeating Entails, that may occur to the ingenuity of lawyers in future times that have not yet hitherto occurred; and therefore to what extent that may be carried it is quite impossible to say.

Is there not at present, under the feelings which exist respecting the law of Entail, on the part of proprietors in possession, almost a constant struggle between the rational and fair administration of the law and the rigid system which is imposed on them by the law of Entail?—I think I may answer that question in this manner; the object of every proprietor when he makes an Entail, and of course the duty of the professional person whom he employs, is to make an Entail which, as far as is within their power, it shall not be possible to defeat; on the other hand, when the succession opens to heirs, and when inconveniences, hardships or grievances of any description occur, it is the natural wish and object of every person labouring under these inconveniences to try if by any means he can defeat those restrictions which bear hard upon him; in this way there is a constant conflict between the entailers and between the heirs of the entailer, so far as regards the restrictions in the deeds of Entail.

In point of fact, therefore, does it not frequently happen that an entailed proprietor finds himself fettered by restraints, which are extremely inconvenient, he having no object but to administer his estate fairly for his own benefit, and that of his posterity?—It very frequently happens.

Are you aware that private Acts of Parliament have frequently been applied for, and obtained for purposes decidedly hostile to the intention of the entailer; flaws and imperfections in the Entail having been discovered which made such application permissible?—I do not think there have been any recent applications. I believe, in early times, applications were made to Parliament, but I am not aware of any lately, except for exchanges of property.

Do you consider the Act of the 10th of George the Third has conferred those advantages which in its preamble are contemplated?—I think the preamble shews that it must have been in contemplation at the time, that some further remedies would be necessary, if the system of entailing were allowed to go on; for it says, "that the evils must daily increase *so long as the law allowing such Entails subsists*, if such remedy be not provided." That appears to me to convey an idea, that at the time when it passed it was in contemplation that it was a temporary, but not an effectual, relief; and I think that this must have been the case, from the circumstances which led to the passing of that Act.

Do you consider that the provisions of that Act have given effectual relief, and effectual means to proprietors to improve their estates?—By no means.

State the reasons which occur to you, as having prevented the provisions of that Act from having come into full operation, and given adequate and full relief?—In order to protect the interests of subsequent heirs of Enlail, the Act requires various specific formalities to be attended to in carrying through the provisions of it, by which the Entail proprietor is enabled to burthen the estate at all. These technical provisions are very minute, and there are many chances that some of them may not be duly attended to. In numerous instances, the money that has been expended

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under the provisions of the Act, and obtained upon securities supposed at the time to be valid, have turned out to be objectionable, and have been set aside, as not affording the means of recovering payment from subsequent heirs of Entail. Perhaps I may be allowed to call the attention of the Committee to one or two of these. It is provided, that the proprietor who intends to lay out money shall, three months at least before he begins to execute the same, give notice in writing to the heir of Entail next entitled to succeed to the estate, after the heirs of the body of the proprietor, of his intentions, and that he shall lodge a copy of the notice with the sheriff clerk of the county in which the lands are situated, and attend to various forms required by the statute. If in any one particular, however trifling, there has been a departure from the exact specified terms in the statute, the security which may have been granted for the money does not form a claim against the substituted heir of Entail.

In point of fact, have not very many cases occurred where securities were believed to be real, which were subsequently found to be good for nothing?—So many, that I am sure, for my own part, I can have no hesitation in saying, that if a person were to ask my advice as to whether he should lend his money upon such security, I would certainly not advise him to do it, unless the peculiar circumstances of private family friendship, or considerations of that kind; but as a mere marketable security, I should not recommend it.

Do you believe that such is the general opinion upon this subject among the professional men who have opportunities of forming opinions upon it?—I should think so, because there are so many objections that must occur within the experience of every professional man who attends to the reported decisions of the court.

Do you believe also that such is the opinion of monied men who may have money which they may be disposed to advance on security that is good?—I should presume monied men, before they entered into a transaction of that description, would take the opinion of the professional persons whom they were accustomed to consult.

Do you apprehend that many entailed proprietors have been deterred from endeavouring to relieve themselves under the provisions of the Act, from feeling the difficulties that stood in their way, and from the uncertainty whether they could make such a transaction as would be advantageous to them?—They must necessarily be so if there is the difficulty of finding the money. If the security is not a good marketable security, they cannot go on with their improvements until they have a reasonable certainty that they are to find the money; and if the difficulty of finding it is great, how are they to proceed?

Do you apprehend, that in consequence, proprietors have been in many instances driven to raise money upon very disadvantageous terms?—It has been a very usual thing for entailed proprietors to raise money on annuities, by which means they must insure their own lives in order to secure the principal sum upon their deaths; and in that way they must pay both the interest of the money, and all the expenses attending their life rent insurances.

Where this Act has been resorted to, do you apprehend that there are now many cases where it may be said it has operated as a snare, both to the party who may have been desirous to use it, and to those who may have been induced to advance capital upon the faith of it?—I do not know whether it can be considered and intended as a snare.

No not intended, but operating as a snare in point of fact?—It certainly has produced the same effect.

Is the Committee to understand, that transactions have been entered into, where it will be found, that although the security was believed to be good, it will not turn out to be the fact?—I believe in many instances, that the entailed proprietor entering into the transaction, and the person with whom he contracted, both contracted in perfect good faith; the one expecting that he should have the benefit of getting the advance; and the other, that it was to be a security against the subsequent heir of Entail. But when the next heir of Entail comes into possession, that affords no answer to his objection to pay the money.

Is the Committee to understand, that there have been many instances of supposed compliance with the statute, which have been found insufficient?—There are several reported decisions of the court to that effect.

Is it your opinion, therefore, that this statute (taken in a large and comprehensive sense) has been inefficient to the purpose of conferring upon entailed proprietors the

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means of improving their estates?—I think the statute has conferred it to a very limited extent, and I think the obstructions that have been mentioned; the difficulties and the doubts are such as go still further to limit the operation of the statute.

Do you consider, that supposing an actual and valid security to be obtained and taken under this statute, that the operation of that measure is beneficial to succeeding heirs in the estate?—It depends entirely upon the manner in which the money is to be expended upon the estate; whether it makes a return to the succeeding heir equivalent to the burden under which he has been laid. I believe there are many instances in which the improvements that have been made, have been rather more of an ornamental than of a permanently beneficial nature; such improvements as a proprietor would naturally be inclined to make near his own place of residence, although to a certain extent he must comply with the terms of the statute, specifying inclosing and draining, planting &c.

Do you conceive the difficulty of the compliance with this stutute, has induced many persons either to forego the advantage contemplated by the Act, and either not to improve their estates or if they were determined so to improve them, have involved themselves in inextricable difficulty by adopting other means?—Unless a proprietor has some command of money, independent of the means of raising it in this way, he cannot commence his improvements; because no person will advance money to him on loan in the first instance, on his intended improvements which he expects to perform, and which he may not accomplish. He therefore must have to a certain extent the command of money, while he is going on with these improvements; and then after he has completed them, he may enter into a transaction by which it is replaced. A proprietor in desperate circumstances cannot avail himself of the Act at all.

In cases where money has been borrowed for improvement, on account of the Act of 1770, do you know whether it has been usual to pay a much higher rate of interest, than the rate of interest for money upon other securities?—I am not aware of that; that would infer a charge of usury. I know of no such case. Five per cent has been the usual rate of interest till within a very short period.

Do you think without those securities, stated in the 10th of George the Third, that the heir would be perfectly safe from the extravagance of his ancestor (the person in possession); might he not be at liberty to spend a great deal of money if he chose; in short, might he not incur too large a debt upon the estate?—He could incur no debt at all upon the estate, unless for the provisions of the statute in 1770.

Well, if the provisions wanted those technicalities of which you complain, and gave him a power to improve *ad libitum*, might he not carry the improvements so far as to deteriorate the value of the estate essentially?—I should think there is very little hazard of that for this reason; if he has no other means than his entailed estate, he is naturally called upon if he has other children than the heir, to provide for them, and I rather think that the interest of the younger children would call upon him to save for their benefit, instead of laying out money on improvements of the estate for the benefit of the heir.

Then you think there would be no risk in the improvements on the part of the tenant in possession, if they were not tied up by those technicalties?—That must be governed by the circumstances of each particular case; suppose there were no technicalities, he is limited to the four years rent.

Do not you think four years rent a sufficient allowance for improvements?—That depends very much upon the estate.

Martis, 18° *die Martii*, 1828.

THOMAS FRANCIS KENNEDY, ESQUIRE,

IN THE CHAIR.

Patrick Irvine, Esquire, again called in; and further Examined.

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YOU have stated, that there are technicalities in the Act of the 10th of George the Third, which obstruct the operation of that law, and prevent its being beneficial to the country; are you of opinion that, by simplifying that Act, and doing away those technicalities of which you spoke, it might be rendered beneficial to the country?—I certainly cannot say that an Act may not be framed without those technicalities, which may not produce most beneficial effects; but it will depend entirely upon what those alterations of the Act may be, whether they will produce such effects or not.

Suppose an estate of 5,000*l.* a-year free rent, and that the father, the son, and the grandson, are each in possession of the estate for twenty years each; is it not, under the 10th of George the Third, lawful for each of those persons to burthen the estate with 20,000*l.* for improvements?—When one heir has burthened the estate to the full extent which is allowed by the Act, I apprehend it is not competent for another heir to go on till part of that debt has been relieved; so that there can never be a greater debt upon the estate than one third part of the rents.

Has not each possessor the right, under the 10th of George the Third, of burthening the estate to the amount of four years free rent?—In so far as it has not been exhausted by his predecessor; but if that sum is completely exhausted by his predecessor, he cannot do it.

Does not the 10th of George the Third give a power to each possessor of an entailed estate to borrow money for improvements to the amount of four free rents?—The Act of Parliament of the 10th George the third, contains the following clause; "Provided also, and be it further Enacted, That when a sum equal to four years free rent shall have been laid out in manner above-mentioned, by one or more heirs of Entail, and shall remain a subsisting charge against the succeeding heirs, it shall not be lawful for any subsequent heir or heirs to lay out any more money under the authority of this Act for any of the improvements aforementioned."

Are you aware, from your observation, that within these thirty years the general improvement of Scotland has exceeded anything that was ever seen in any country?—I am quite aware that the general improvement of Scotland has been very great; but, in my apprehension, it has been great in spite of this law, not in consequence of it.

Is there any marked difference between the improvement of those parts of Scotland which are entailed, and those parts which are not entailed?—I think I said in my evidence yesterday, that I had heard it generally said that those who were qualified by their knowledge and experience of agricultural operations (which I do not pretend to be) may, in passing through some districts of country without knowing anything of it but the appearance of the country, distinguish the entailed from the unentailed property; but I must be understood as not saying this of my own personal knowledge, but that it is what I have heard experienced persons may do in some districts.

Is not there a statement to that effect contained in a publication made some years ago, by a very eminent person in Scotland, Mr. David Wemys?—I have read that statement some time ago, and it may be contained in that publication; I cannot call to my recollection whether it was there that I saw it, but I am sure that I have seen it in some statement, and heard it repeatedly mentioned.

Does it not happen that outlays of money for improvements highly beneficial to landed property, are prevented by the law of Entail?—Surely; I apprehend that the law of Entail throws very great obstructions in the way of entailed proprietors expending money in improvements which, if they held the land in fee-simple, they would not hesitate to perform.

With regard to the technicalities of the 10th George the Third you have alluded to, do you, of your own knowledge, know that considerable hard-ship has arisen from persons not having observed those technicalities from time to time?—The re-

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ported decisions of the court establish it; because in many cases it has happened that persons who have *boná fide* advanced money, trusting to the security, have been disappointed in their claims, when they endeavoured to render them effectual against subsequent heirs of Entail.

Are you aware of any case of this sort having happened, that the three months notice required by law having been given to the next heir of Entail, and no challenge upon his part afterwards being given, yet that the heir of Entail in possession has lost the value of those improvements which were executed between the day of the notice and the day on which he gave his consent?—In the case of Elliott *v.* Elliott, it was decided that the burthen upon subsequent heirs was not effectual, in so far as regarded buildings and improvements executed within the three months subsequent to the notices given in terms of the statute, nor in so far as regarded farm-houses, lime-kilns, or outhouses not mentioned in the previous notices.

Are you aware, that in the folio edition of Erskine's Institutes, there is an abstract of this Act, which has led professional men in Scotland into considerable error as to the technicalities to be observed in establishing the claims of heirs of Entail to valuable improvements executed upon the estate?—I believe there is such an abstract, and I believe that abstract is not accurate; and I think it the professional duty of every man of business not to trust to any abstract, but to have recourse to the Act itself.

Has not that led to the outlay of large sums of money which, in point of fact, have since been lost?—I believe it has.

Was there any feeling on the part of the public in Scotland, so far as you are aware, that led to the passing of the Act of 10th George the Third?—I believe the Act was occasioned by the proceedings that took place in the faculty of advocates, a very few years before the Act was passed.

What led to those meetings in the faculty of advocates?—Mr. Lockhart, who was then dean of the faculty, I have understood, upon the suggestion of Lord Mansfield, took up the question in the faculty, and stated that the law of Entail was extremely injurious to the country; that the operation of it began at that time to be still more particularly felt, because the improvements in Scotland were then just commencing, after the abolition of heritable jurisdictions and tenures by military service.

Was this Act the result of those meetings?—Those meetings were continued in the faculty of advocates for, I believe, the period of two or three years.

Were not the proceedings that were then instituted by the faculty of advocates considered very universally throughout Scotland, and approved of by the barons of the Exchequer, by the court of Session, and by almost all the counties of Scotland?—The faculty of advocates continued to consider the measure for a period of nearly, I believe, three years, during that time there were very full discussions in the faculty, and the heads of a bill were prepared to be brought into Parliament; those proceedings were laid before the judges of the court of Session, the barons of the Exchequer, and the society of writers to the signet, and communicated to the sheriffs and freeholders of the different counties, and to the magistrates of the different burghs; and it appears from the periodical publications of the time, that there was a general opinion in the country, that some remedy was necessary to protect the country from the injuries arising from the law of Entail. The heads of the bill thus prepared by the faculty, were deliberately considered in the faculty, and put to the vote each provision after another; and as well as I recollect, the heads of the bill were approved of by a majority of above forty, there were only four in the minority; and it was upon that that the communications were made to the different public bodies I have now mentioned. The barons of Exchequer, I understand, stated to the Dean, Mr. Lockhart, that they considered the faculty of advocates deserved well of the country, for the attention which they had paid to the subject. It does not appear that the court of Session expressed any opinion upon the subject, and probably they might feel a delicacy in doing so, as they might be called upon to decide upon the law without regard to its expediency or its inexpediency. The society of writers to the signet concurred with the faculty of advocates, and there was a general expression of the public bodies of the country, in stating an opinion that some measures were desirable and necessary, leaving it with the wisdom of Parliament to determine what those measures should be.

Did not the convention of royal burghs come to an unanimous resolution, approving of the draft of the bill of the faculty of advocates?—The corporation of royal burghs unanimously approved of an application to Parliament, for the purposes proposed

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proposed by the faculty of advocates, and the society of the writers to the signet signifying their approbation to the measure.

Are there not resolutions extant, adopted by various counties duly convened, expressive of an opinion that the Act of 1685 required alteration?—From the resolutions adopted by most of the counties, it appeared at that time, that according to the general opinion the law required amendment, the particulars of which, the freeholders and heritors submitted to the wisdom of Parliament.

This was previous to the year 1770?—It was.

In your opinion, has the statute of the 10th George the Third, operated to relieve the grievances which existed at the time the draft of the Bill was framed by the faculty of advocates, and approved of by the convention of royal burghs?—It has operated to a limited extent.

When you say to a limited extent, do you mean to confine it to those heirs who have availed themselves of it, or do you think that generally, to the heirs of Entail, that Bill has been a relief?—It can only operate beneficially for those who have availed themselves of the provisions of the statute.

Do you not think that the situation of subsequent heirs of Entail, coming into the inheritance, with all the fetters, and with the additional burthen cast upon the estate under the 10th of George the Third, is even worse than it would have been if that statute had never been passed?—I can scarcely say what consequences might have resulted, if there had been no statutory provisions.

Are there not a great many entailed estates in Scotland, to which the provisions of that Act have not been applied?—There are many where the provisions of the Act have not been applied.

Judging from those in which it has not been applied, and from those in which it has been applied, what in your opinion is the balance of good or evil resulting from the application of the statute of the 10th George the Third to a strictly entailed estate?—I think it has been acted upon beneficially in some particular instances, but that it is not well calculated to confer a general benefit or a sufficient relief from the inconveniences arising from the general law of Entail.

Supposing an heir of Entail availing himself of the provisions of the 10th George the Third, to expend money judiciously, is it your opinion that the subsequent heirs of Entail derive a benefit from that expenditure, the burthen cast upon them being taken into consideration; or that upon the whole they suffer from the additional burthen, when added to the fetters of the Entail?—Very frequently, I consider that the additional burthen laid upon the subsequent heirs of Entail, does more than counterbalance the actual improvement and benefit performed upon the estate, for which the money has been borrowed.

If it be expended injudiciously, which of course is at the option of the heir in possession availing himself of that power, it is hardly necessary to ask whether it is not a serious detriment to the subsequent heirs of Entail?—Very often it is expended upon improvements which are calculated and intended for the immediate improvement, but not for the permanent improvement, of the estate. The subsequent heirs of Entail do not derive benefit from money expended upon the estate, unless it is expended upon permanent improvements.

There is a clause in the statute, which enables the heir in possession to expend two years clear income upon the mansion-house, besides the four years income upon the land?—Yes, four years upon the improvements of the land, and two years upon building or repairing a mansion-house.

And upon that expenditure, there is no limit imposed upon the caprice or taste of the owner who so expends it?—No; I believe that he may even allow it to go into a state of total disrepair.

Are not those evils to which any estate must be liable, whether entailed or no, provided the existing owner of an estate lays out a large sum of money injudiciously upon his estate, must not it equally burthen his successors, whether the estate be entailed or no?—Certainly, every heir must of course suffer from the imprudence of his predecessors; but the hardship in the case of the entailed proprietor is, that the expense of building or repairing the mansion-house is laid upon him, out of his restricted means, although it may be in a situation which does not suit his taste, and although it may be allowed to fall into disrepair before he succeeds to the property, and still the payment of that burthen must come out of his pocket.

Under the statute of 1685, the subsequent heirs of Entail are protected from all such imprudence on the part of the heir in possession, but the statute of 1770 exposes them to the consequences of such imprudence: then, from your general

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knowledge of the exercise of the powers given under the statute of 1770, is it your opinion, upon the result of your general experience, that it has or not operated as a benefit to the heirs of Entail in Scotland generally?—I should rather be inclined to think, that the burthen laid upon them greatly excends the benefit derived from the improvements. Under the Act of 1685, the subsequent heirs were entitled to take the estate with all the improvements made by their predecessors, without being liable for payment of any part of the expense laid out upon the estate.

Are the checks which are imposed by the Act of the 10th George the Third, checks at all limiting the discretion of the heir in possession in his outlay; or are they only such checks as provide security for future heirs of Entail, that the money has been actually expended in the way that the vouchers upon the face of them purport?—The Act provides the particular manner in which the money shall be expended. I rather believe that that manner is not always very strictly attended to.

Will you mention what the checks are?—The proprietor of an entailed estate shall three months before he begins to execute the improvements, give notice in writing to the heir of entail next entitled to succeed to the said estate after the heirs of the body of the said proprietor, specifying in such notice the kind of improvement intended, and the farms or parts of the estate upon which the improvements are intended to be made.

Upon that check, is the substitute entitled to interfere and to object to the nature of the intended outlay?—I should presume that the intention of the legislature was that he might do so, but I do not know any instance in which a substitute heir has ever done so, because it is quite obvious that he has a much better plan to pursue. He takes no notice of it, and if in any respect the improvements are not made precisely and strictly in the terms of the Act, then he declines to be liable for the burthen incurred in making them.

Has there not a case been decided in which an objection was sustained, upon the ground of the account lodged with the sheriffs clerk not having been subscribed by the heir of Entail individually, although duly lodged and signed by the agent under whose management the improvements were carried on in his absence?—There has.

Are not the niceties and technicalities such that it is impossible for the heir of Entail to raise in the market openly money at the legal rate of interest for such improvements under this Act of Parliament?—I think I said yesterday that there were so many hazards arising from the non due observance of those technicalities, that in short I would not consider it a marketable security.

Is it possible in the market at Edinburgh to borrow money at legal interest under the terms of this statute, friendship apart?—I cannot say that it is impossible to do so, but I say that it is one of the kinds of security that I should least of all prefer either to take or to recommend.

Has not the thing been done?—Money has been lent certainly.

And have those irregularities taken place vitiating the security?—Yes.

Do you think that great difficulty would be found in raising money upon such security?—I believe that the money that has been raised has generally been advanced by those who stand somehow connected with the family.

When the notice is given by the heir of Entail in possession to the next substitute that he is going to undertake improvements, is the amount laid out upon improvements between the date of the notice and the assent upon the part of the next substitute effectual charge against the estate, or is it not?—No; it has been decided that after a notice has been given, if the improvements have been commenced before the period at which that notice expires, that that notice is not sufficient in order to render effectual the burthen upon the estate.

Then how is it possible for the substitute to have that control over the expenditure of the heir of Entail in possession, which you say he has by lying by to see whether those improvements are valuable or not, when in point of fact they are void up to the day of his giving his assent?—The security is not void; it is only voidable upon shewing that the strict literal terms of the Act had in some respect or other not been complied with.

Supposing that money has been expended upon an entailed estate, and that all the technicalities of the law have been complied with, and it is made an effectual charge; has the next substitute any means of enforcing the repair of those buildings upon which the money has been so laid out and expended, and which money has so become a charge upon the estate?—When the buildings have once been erected

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upon the estate, the burthen and expense of which is laid upon the heir, there is no provision in the statute by which it is made incumbent upon the heir to preserve those buildings in such a state of repair that the succeeding heir may enjoy them in a state of equal value with the value that has been put upon them, and for which the estate is made liable.

Are you aware of a case in which a noble lord believed that he had secured about 100,000*l* under the Act of the 10th George 3, and where the security was found to be good for nothing?—There may be such a case, but I cannot at present call it to my recollection.

You stated, that provided the possessor of an entailed property conforms to the technicalities of the statute, he can raise a sum equal to four years of the rental, for the purpose of improvements; who is the judge whether those improvements are beneficial to the property, or not?—He gives notice to the next heir of Entail; but there is no provision in the Act, by which he obtains any judicial authority approving of the nature and extent or description of the improvements which he means to make. It is optional to the next heir of Entail, if he is so inclined, to state his objection; but I have never heard of an instance where it has been stated.

Supposing that a possessor of an entailed property chuses to lay out a certain sum of money in expenditure, partly ornamental and partly beneficial, how is it to be ascertained whether he has a right to saddle it upon the estate or not?—The statute provides, that it would be highly beneficial if proprietors of entailed estates were to lay out money in inclosing, planting or draining, or in erecting farm houses and offices, or outbuildings for the same, upon their entailed lands and heritages. I should presume, that if instead of expending the money in those improvements which are specified in the statute, the money was to be expended upon improvements exclusively ornamental, or improvements not falling under the terms of the statute, it would be in the power of any subsequent heir of Entail, when called upon to repay the expense of those improvements, to object upon the ground that they were not improvements falling under the terms of the statute.

Is the objection of the next heir of Entail sufficient to prevent the outlay of the money?—The heir in possession might expend the money, notwithstanding any objection that was stated, but it would unquestionably bar his claim if the objection was well founded.

Are not heirs of Entail subject to many demands on their estate, such as subscription parish roads and bridges, which they cannot charge upon the estate?—They are subject to every charge which landed proprietors are subject to in the course of the management of their estates, and they cannot lay those charges upon subsequent heirs of Entail, unless they have been specially allowed to do so by statutes posterior to the Act of 1685.

Supposing that the notice has been duly served on the next heir, and that the improvement should not be concluded in the terms of the preamble, and that the next heir on notice, has failed to object; would he or his successors be foreclosed from any objection thereafter, by his not objecting at the time the notice was given?—In all those cases which have been referred to as decided, the heir to whom the notice was given, never did state any objection until he was called upon to pay the sum; he did not state his objection at the time notice was given to him, but the improvements took place, the money was expended, and when the subsequent heir was called upon to repay this burthen, "No;" says he, "the terms of the statute have not been complied with."

And yet in those cases the notice had been duly served on the next heir, specifying the nature of the contemplated improvements; are there any cases going that length?—After a decree of declarator by the court of Sessions, I believe the law to stand, that the heir who can come forward and shew any point upon which the Act has not been complied with, is not foreclosed by a decree of declaration from stating his objection and from getting free from the burthen, because the effect of a decree of court is to declare in so far as the statute has been complied with, that the claim is established; but you go out of the statute altogether, if you shew that the terms of the statute have not been complied with, and therefore no decree of declarator can foreclose the heir from stating his objection to the payment, provided he shews that the case does not fall under the statute.

Is not the state of the law upon this point this, that within the term of the notice the substitute heir may object to any improvements whatever, but that after the term of that notice is expired, he can only object to such acts of his predecessor as do not fall within the terms of the Act?—The subsequent heir is not called upon to object to

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the improvements, he is only called upon to state his objection, when the demand is made upon him for payment; and the manner in which he gets free of the claim is by refusing to pay, and by shewing that the terms of the statute have not been complied with, and therefore that he is not liable to the burthen.

Is not the object of the notice which the Act prescribes, this, that if the substitute heir objects to the improvements contemplated by his predecessor within the term of that notice, he may thereby be liberated from all burthen to be entailed upon him by the proposed expenditure?—No, I apprehend not; I apprehend the question will then occur whether those improvements were really improvements within the statute, and if they are improvements within the statute, I do not see why the objection of the substitute heir should have any effect; he is called upon to see that the improvments proposed, are really improvements within the statute.

Then, are the Committee to understand, that the only object of that notice is, that the substitute heir may have an opportunity by that notice of examining the improvements, and thereby exercising a superintendence?—And of objecting to those improvements, if he sees cause.

But that it gives him no power of exempting himself from the burthen to be entailed upon him by those improvements, than if such notice were not given?—I conceive not; I conceive the sole purpose of it is to give him an opportunity of judging, while those improvements are going on, whether those improvements are or are not improvements under the Statute.

Is there any record office in Edinburgh, or any registration in different counties in Scotland, which would enable the Committee to ascertain in how many cases this Act of the 10th George 3, has been carried into execution where there is an Entail?—The Act requires that the whole procedure shall be lodged in the office of the sheriff clerk of the county in which the lands lie. In practice the business is generally conducted by the country agent of the entailed proprietor, whose place of residence is near the property; and there is no general record in Edinburgh applicable to questions of this description.

Though the Committee might obtain from the local registration a return of the charges intended to be made good, those which have failed to be made good would not be distinguished in such return?—No, the purpose of the registration is merely for preserving evidence of the procedure.

Therefore the Committee could obtain no return of the number of cases in which the charges under the 10th George 3, have been made good upon entailed estates?—The Committee might obtain returns of all those cases in which burthens have been laid upon an entailed estate, but whether those burthens have been rendered effectual or not, the sheriff clerk can shew nothing, because it is not a matter of judicial proceeding.

Might not a return be obtained from the court of Session or from the sheriff clerk, shewing what actions of declarator have been brought to constitute those improvements a charge upon the estate?—Each clerk of the court of Session might make a return of those cases which have gone into his office.

Supposing all the technicalities of notice to have been observed, and that the improvements are of such a nature as are specified in the statute, is the substitute heir allowed in an action of declarator to question whether the money raised has been expended judiciously or not?—If the money has been laid out under the terms of the statute, in inclosing, planting or draining, or in erecting farm-houses or offices, or out-buildings, I do not see in what manner he could go into any question with regard to the judicious nature of those operations.

Would the heir in possession be required in such an action to produce evidence of experienced surveyors, that the money has been expended upon those objects judiciously?—No, I apprehend not, if he has lodged vouchers to show that it has been expended on those objects allowed by the statute.

If by any neglect, the vouchers of the outlay should fail to be lodged with the sheriff of the county within two days of Martinmas, would not that vitiate the security of any money advanced?—If the vouchers are not lodged within the precise period fixed by the statute the security goes for nothing.

Do you know any case decided by the court of Session, where the substitute heir has questioned the expenditure of the money raised, upon the ground that the money, although laid out on the objects contemplated by the statute, has been expended injudiciously?—No, I do not know any such case, merely upon the ground of injudicious expenditure.

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Do you not know a case, where, on account of the casual omission to record the accounts of expenditure only seven days beyond the period fixed by law, the security was vitiated?—I do.

Is there a recent decision of that nature?—There is a decision of Campbell *v.* Douglas, on the fifteenth of May 1822.

Will you state what the omission was?—In that case the objections were sustained, founded upon the casual omission to record the accounts of expenditure until seven days beyond the four months allowed by the statute for that purpose.

And the expenses contained in the whole account were set aside, upon account of that casual omission?—They were.

What was the amount of the expenditure in that case?—Five thousand pounds. This forms the great objection to the security, because, in Scotland, the security of the records is such, that in carrying through a loan upon the security of heritable property, every person has it in his power, by examining completely the records, to ascertain exactly what burthens exist upon that property, and the validity of those burthens; and he therefore can judge whether it is a property of sufficient value to place him in safety, in advancing his money upon the security proposed; but if it is to be advanced upon a security of this nature, he cannot possibly have that certainty, because, if there is not a due attention to those minute technicalities, he can have no means of acquiring any knowledge of it, till it is stated to him as an objection to the payment of the claim.

Would that evil be remedied by obliging the heir in possession to bring the action of declarator under the Act?—The action of declarator has been found not to be sufficient, because, if you go out of the Act, even the action of declarator is not effectual.

Is there any case in which it has been decided, that an action of declarator is not final to all intents and purposes, if not appealed from within one year?—I cannot state a particular case, but I found my opinion upon the general principles of law.

Will you have the goodness to read the 26th clause of the Act of 1770?—"And whereas questions may arise concerning the amount of the sums laid out under the authority of this Act, at a great distance of time, when the material witnesses may be dead; For remedy whereof, and for ascertaining in due time the amount of the sums so expended; Be it therefore Enacted, That it shall and may be lawful for every heir of Entail, after he shall have laid out money upon the improvement of his entailed estate as aforesaid, and shall have completed the improvement of all or any particular part of such estate, to bring, if he shall think proper, an action of declarator before the court of Session, or a process before the sheriff, in which he shall call the heir next entitled to succeed after the heirs of his own body, and shall, in such suit, produce proper evidence of the money laid out in such improvements, and the said next heir, or any other heir of Entail, shall be entitled to produce proper evidence to set aside or diminish the said claim; and it shall and may be lawful for the said court of Session, or for the said sheriff, to pronounce a decree for such part of the said sum as by the true intent and meaning of this Act is intended to become a charge against the succeeding heirs in the said entailed estate, which decree, if pronounced by the sheriff, shall become final, unless carried to the court of Session by suspension, within six months after the same shall have been pronounced; and if pronounced by the court of Session, either in such process of declarator, or suspension, shall be final, if an appeal is not brought within twelve months."

Do you conceive it would be competent for any person, afterwards succeeding to the estate, to raise a question as to the propriety of any charges which had been so authorised by the court of Session, under that action of declarator?—Not unless he can show that there has been some irregularity in the procedure, which takes it out of the statute of 1770.

Is not the question, whether it falls under the terms of the Act, one of the points which is to be decided by the court; and has not the legislature said, that their decision upon that question is final, if not appealed from within one year?—The clause of the statute is, "that the court of Session, or the sheriff, shall pronounce a decree for such part of the sum as by the true intent and meaning of this Act is intended to become a charge against the succeeding heir, in the said entailed estate." That forms a charge against the heir, unquestionably, unless in so far as he can show that there has been an error in the mode of proceeding, by which it was intended to be declared a burthen upon the estate; but if he can show that the terms of the statute of 1770 have not been complied with, I apprehend that

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the action of declarator affords an objection to the subsequent heir against the burthen.

If after an action of declarator, the subsequent heir of Entail discovered that the original notice had been served upon an individual, who, although he was supposed at that time to be the next heir, turned out, on due examination, not to be the next heir; would such a technical objection to the service of the notice, even after the action of declarator, in your opinion, justify an objection to the payment of the debt?—Such an objection has been sustained.

Will you state the case?—In the case of Thomson and others *against* Mowat, on the 11th of December 1824, it was decided, that an intimation to a party, *bonâ fide* believed at the time to be the next heir, but to whom it was afterwards ascertained by the decision of a nice point of law, that such character did not belong, was not a sufficient notice, in terms of the statute, to render the claim upon subsequent heirs effectual, although a decree of declarator had been obtained for the amount of the sum, which would have been made a burthen upon the estate, if the proper heir had been cited.

Was the misnomer of the party, cited to appear, to the action of declarator?—That does not appear.

In that case of Thomson *v.* Mowat, do you know whether the action subsequent to the act of declarator, was within the twelve months?—I should think, from the statement that is made, that it could not have been within the twelve months.

You say that an objection that the charges have been made upon terms not falling within the provisions of this statute, will void an incumbrance at any time?—I think so.

Are there any other objections which can be made to such an incumbrance?—If the terms of the statute of 1770 have been strictly and literally complied with, and if there is a decree of declarator fixing and ascertaining the sum which should be the charge against future heirs, I am not aware of any other objection that can be stated.

Are there any means whatever by which a substitute heir can object to improvements, as having been imprudently or insufficiently executed, provided they fall within the legal terms of that statute?—None.

You stated that there was a very general feeling expressed in Scotland in the years 1764, 1765 and 1766, upon the subject of the law of Entail; do you know whether, amongst those who expressed that opinion, there were many considerable entailed proprietors?—That opinion was first expressed, in the first instance, by the faculty of advocates; it was conveyed to the freeholders and heritors in the different counties, and from having been conveyed to them, it must necessarily have been conveyed to entailed proprietors, who formed one part of the heritors and freeholders to whom the communication was made, and who expressed their opinion upon the subject.

Did those meetings of freeholders comprehend many large proprietors?—Those meetings are the meetings in which the freeholders of the county express their opinions, and therefore may be supposed to be generally attended by those who take an interest in what is occurring that affects their own interest. There is no evidence remaining now, examined by me, of the number of freeholders that attended meetings of that description.

Do you know whether any record has been preserved of the discussions which you say took place at the faculty of advocates in 1764?—There are minutes of the proceedings of the faculty.

You have stated, that in some parts of Scotland you have heard, from good authority, that persons experienced in the subject could distinguish between entailed and unentailed lands, from their appearance; can you instance any parts of Scotland in which that is particularly the case?—No, I cannot call to my recollection any particular parts that were mentioned, but generally.

Do you conceive that the law of Entail in Scotland has operated as a very great impediment to the progress of agriculture?—I have not the least doubt of it.

Are you not aware that the Lothians, and Strathmore and other parts of Scotland, are amongst the very finest agricultural districts in this island?—The Lothians and Strathmore are certainly very valuable districts, and well cultivated.

Do you not believe that they are amongst the very finest agricultural districts in this island?—I cannot pretend to compare them with England; I believe they are considered so, as compared with districts in Scotland.

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Are you aware whether any large proportion of those lands are subject to the law of Entail?—In Forfarshire, I believe, there are lands to a very considerable extent in value, under Entail.

Are you not aware whether that is the case in other districts of that description?—There is scarcely a district in Scotland, I believe, in which there are not lands of greater or smaller value, under Entail.

Then it is fair to presume, that a large proportion of those finely-cultivated lands are under strict Entail?—Certainly; for I believe that a considerable proportion of the great and leading proprietors in Scotland, are subject to Entails.

How do you reconcile that fact with the opinion which you express, that the law of Entail operates very generally as an effectual bar to improvement in agriculture?—I only say that agriculture would have been in a much higher state, if it had not been obstructed by the operation of the law of Entail; I do not mean to say that there have not been very great and very essential improvements in Scotland within these few years; but I say that those improvements would have been of still greater magnitude, if it had not been for that obstruction.

On a comparison of the present condition of the great entailed estates in Scotland, with possessions of smaller proprietors in their immediate neighbourhood, of equal quality of soil; have you any doubt which is the best cultivated?—I have no doubt that the properties of the middling class of proprietors, I do not say the very small proprietors, are generally the best cultivated.

Is not that the case with land, whether entailed or unentailed, small properties being more under the management of the proprietor?—Properties of a middling extent will generally be better managed than very large properties, which often fall under the management of subordinate persons, whether the property be entailed or not.

Do you imagine that many Entails which now exist, may have been executed subsequently to the great and substantial improvements having been made in some of the finest districts in Scotland?—Entails have been going on for a course of many years, spreading gradually over the whole period of time; consequently some of those entails may have been made before the improvements, and others of them after the improvements.

Do you not believe that the Entails in the old families of Scotland are generally of a date prior to the last fifty years?—I can scarcely say that they are generally older, although I have not the least doubt that there are a great many of them so.

Are there not a great many of those that are situated in the rich districts of the kingdom?—Many of them are situated in highly-cultivated districts.

Do you suppose it possible that any improvements which could have been made more than fifty years ago, within those districts, would give those districts that very highly-cultivated condition in which they exist at present?—I believe there was extremely little improvement carried on in Scotland previous to the time when the heritable jurisdictions, and service by military tenure, were abolished in 1747; and that, until that time, a great part of the country was in a most neglected and miserably uncultivated state. I may state, that it is chiefly within the period of fifty years that there have been good turnpike roads, and communication established all over the country; and until those roads were established, agricultural improvements were necessarily impeded, or I should rather say, did not take place, because there were not the same means of carrying them on that have existed since turnpike roads have been generally established throughout the country.

Upon those estates which have been entailed for more than fifty years, is it probable, with the difficulties which that Act of the year 1770 imposes, that any very extensive improvements should have been made within the last fifty years?—I may observe, that the obstructions to improvement are peculiarly applicable to those proprietors, who have no other resources for improving their lands, or no other means of doing so, than what the entailed estate affords. If the entailed proprietor has other means, separate and distinct from his entailed estate, then the Entail does not operate in the same manner to prevent the improvement of his lands, because he has other means of doing so. The great obstruction to improvement is in the cases of those entailed proprietors, who have no other resources but what the entailed property affords. In many cases it was not an unusual thing to entail a property, and to leave property unentailed. So long as the proprietor was in possession of the two estates, the entailed and the unentailed, he then had it in his power, by the

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credit he could command by the management of his unentailed estate, to expend money in the improvement of both, in the manner he thought most expedient.

Then from the means you have of judging, should you attribute much of the agricultural improvement, which appears within those districts, to the means which the proprietors may have had from other circumstances of improving their estates?—Yes, and I conceive that, in the case of those proprietors who had no other means than that afforded by the entailed estate itself, that improvements upon such estates must have been upon an extremely limited scale, if they could take place at all.

You have stated, that the principal improvement in the cultivation of Scotland has taken place since the destruction of the heritable jurisdictions, within the last fifty years; and yesterday you stated, that since the passing of the statute of 1685, 1,659 deeds of Entail have been recorded; will you state what proportion of all those deeds of Entail have been recorded within the last fifty years?—Since the year 1775, there have been about 1,020, out of the whole number of 1659.

You gave yesterday to the Committee a general outline of the provisions of the Act of 5th Geo. 4, chap. 87; will you state to the Committee, whether you consider the principle of that Act to be sound and beneficial to the public, and to heirs of Entail in possession, and to substitute heirs of Entail?—I conceive that the Act gives an advantage to the present generation of Entail proprietors in providing for younger children at the expense of subsequent generations; and that it relieves the present generation to a certain extent, from that burthen for which they should have otherwise provided. An entailed proprietor, instead of providing for his younger children out of his own means and resources, by savings from his annual income, or by insurance upon his life, in order to provide for his family, relieves himself from that obligation by laying upon subsequent heirs the burthen for which he should have otherwise provided, and for which they were not liable under the previous statute of 1685.

What do you consider to be the effect upon subsequent heirs of Entail of this statute, taken in combination with the preceding statute of 10th Geo. 3, upon each heir in succession?—The statute of 1824 has scarcely yet come into operation; but if entailed proprietors shall exercise the power allowed to them of burthening the lands for improvements, to the extent allowed by the statute of 1770, and shall likewise burthen the subsequent heir to the extent allowed by the Act of 1824, the subsequent heir of Entail when the succession shall open to him, must find himself in a very embarrassing situation. He may be under the necessity of applying one-third part of his income in meeting the claims under the statute of 1770, and another third part of his income in meeting the claims under the statute of 1824. There is only one-third remaining to himself, out of which he has to defray the expense of living suitably to the situation of a proprietor possessing the whole estate. He has to incur all the expenses of managing that estate; all the hazard of litigation with tenants and others necessary to support and protect his rights; and in every case where the heir succeeds under such burthens, he is placed in a situation very far from being enviable.

Do you consider consequently that the effect of this statute is particular, but still more when taken in combination with the 10th Geo. 3, if acted upon must be to impoverish the heirs of Entail, each in his generation, upon his succession to the estate?—It appears to me, that it is most likely that heirs of Entail will be inclined to avail themselves of the provisions of the statute of 1824, in preference to the provisions of the statute of 1770, because it is a stronger principle of action in men to provide for their families than to improve their estates; I therefore conceive, that the statute in 1824 must produce in a great measure the effect of rendering the statute of 1770 almost altogether nugatory, because where an entailed proprietor burthens his estate to the extent of one-third of his rent for provisions to his children, it will be almost an act of injustice to his heir to burthen him likewise with another third for the improvement of his estate.

Do you consider that this Act is a violation of the valuable and vested interest of each heir in succession, provided it be acted upon by his predecessors?—It unquestionably, if acted upon, burthens each heir in a manner in which he could not have been burthened under the Act of 1685.

Do you consider that this Act of Parliament is founded upon a principle directly at variance with the statute of 1685; and that while it professes to relax its severity, it only renders its practical effect greatly more grievous?—It is a direct encroachment upon the Act of 1685. It relieves the present generation of the burthen of providing for their families, but it throws that burthen upon the succeeding generation.

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Must not the effect therefore of this statute be to impoverish the heir representing the family, and to render him incapable of sustaining the rank in society which his nominal station calls upon him to do?—I have already said, that if both statutes are acted upon, it leaves the subsequent heir in possession nothing beyond one-third part of his rents; and the situation of every proprietor so burthened, is perfectly obvious and intelligible.

Suppose there were no restrictions of Entail at all, would not the heir be more impoverished than by the Act of 1824?—It would depend upon whether his ancestors spent his estate or not. If the ancestors spent his estate, the heir would succeed to nothing.

If there were no restrictions, would not he have the power to do so?—Every unlimited proprietor may spend his estate, unquestionably.

If the heir of Entail exercises the power given under the Act of 1824, and burthens his estate for the benefit of his widow, to the amount of one-third of the clear rents, and burthens it further to the extent of three years of clear rent for his children; is that amount charged upon the rents of the estate levied at the period of the death of the heir of Entail who so dies?—I think it is specially so provided in the Act.

Suppose that two or three years afterwards the rents of that estate shall fall, would that create an alteration in the settlement upon the children and widow, or would the original charge still continue?—By a provision in the Act, the burthens are to be ascertained at the time of the grantor's death.

Will you have the goodness to read the last clause of the Act.—"And be it "Enacted and Declared, That the powers given and granted by this Act, and by the "said recited Act of the tenth year of the reign of his said late Majesty, shall in "no case be exercised to such an extent as to deprive the heir in possession of any "Entailed lands and estates in Scotland, of more than two third parts of the free "yearly rent or free yearly proceeds of the same; and the court of Session in either "division thereof is hereby authorized and required in each respective case, to give "all necessary orders for relieving the heir in possession from the payment of more "than such two-third parts of the said free yearly rent or yearly proceeds as afore-"said, by authorizing such heir to retain any excess beyond the same from the "security or provision, or securities or provisions, on such Entailed lands and "estates which shall be least entitled by the law of Scotland to legal preference."

Provided bonds had been granted at the period of the death of the heir of Entail, and those had passed into second hands under the former supposition of the rents having fallen; how would it be possible in such case to carry the provisions of that clause into effect?—I should think it extremely difficult.

Do you see any means of doing it?—I do not; but I cannot say that others may not find means of doing what does not occur to me, and therefore I make the distinction between difficult and impossible.

Although this Act of 1824 gives the present heir of Entail in possession ample power of providing for his family, would it not very soon become nugatory in the case of his successors, provided each heir availed himself of it?—There is a provision in the Act which declares, that where there are provisions to the children granted to the full extent, no further provisions shall be granted until the former are diminished.

Supposing then that an heir of Entail receives 5,000*l.* a year from his estate; in order to provide for three children or more, he may burthen his estate to the amount of three years of that clear rent, that would amount to 15,000*l.*, of which the interest would amount to 750*l.*; would not the substitute heir of Entail be able only so far to burthen his estate for a provision for his children as might amount to the difference between the interest which he paid upon the fortunes charged by his predecessor, and one-third of the free rent of the estate?—He could burthen it only to an extent that would keep up but would not exceed the burthen which the first heir may have laid upon it; in so far as that burthen has been diminished by payments to that extent, he would be entitled to burthen it in his turn.

Suppose that the burthen laid upon the estate by the predecessor is not diminished by any payment, but that the interest upon those burthens was annually paid, it would be in the power of the successor only to provide for his children to the amount of the difference between the interest which he paid to his predecessor's children, and one-third of the free-rent of the estate?—Yes.

Then in the course of two or three generations might not that make the provisions

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of this Act totally nugatory?—It might, because there is no provision I perceive in the statute by which those burthens can be carried on.

Might not the interest paid upon the provisions granted by predecessors, in time absorb the whole but one-third portion of the free rent of the estate?—There may, I should apprehend, be a burthen kept up upon the estate constantly and perpetually, not exceeding one-third part of the rents.

But when the interest upon the provisions made by predecessors amounted to that one-third part of the free rent of the estate, it would be no longer in the power of any succeeding possessor to make a provision for his family?—No, because the Act provides a means which the subsequent heir might have recourse to, which is to assign to a trustee the third part of the rents, and no further charge could ever be made against him.

After having assigned that one-third of the rent in discharge of all former incumbrances upon the estate, he has no further power of laying a charge upon the estate for his children?—Not so long as the previous burthen continues.

Then unless he had means sufficient to pay off the principal of those provisions, his successors would remain incapable of making any provision whatever for their children?—Out of the entailed estate.

Supposing that the proprietor took advantage of the statute with all its technicalities, what means would be left to the next heir of Entail to provide for his children?—If his predecessor has burthened the estate to the extent of one-third part of the rents, and if that third remains and continues a burthen upon the estate, there are no means that the next in succesion has to make a provision while that debt remains.

Are the Committee to understand, that he has no means whatever of providing for his family from that entailed property?—I can see none.

Is it not likely that every entailed proprietor will avail himself of the statute of 1824?—It is highly probable that he will. Every proprietor, who is inclined to remove from himself the burthen of providing for his family and throwing it upon his heir, of course will do so.

Do you then conceive that every proprietor will only possess two-thirds of his clear rental, supposing that one-third is settled either upon the wife or his predecessor?—I should premise, that this is a statute that has scarcely come into operation; therefore the interpretation of this statute is settled by no judicial authority. It is open to every one to form his own interpretation according to the words of it; and, therefore, my view of it has no more authority than the view of every man that reads it. But under the statute, I should conceive that it is quite clear, that the proprietor in possession may burthen his estate to the extent of one-third part of the free rent of it, and that it cannot be rendered effectual under this statute to burthen it to a greater extent.

Are the Committee to understand, that that power he has of burthening his entailed property to the extent of one-third, is clear of the private burthens which may be imposed upon it by the entailer?—If there is any entailed debt due upon the property, he must deduct the interest of that debt, because the provision of the statute is one-third part of his rental, after deducting public burthens, life-rent, provisions, yearly interest of debts and provisions, and other burthens affecting the estate.

May not one-third go to the widow by the Act?—Yes.

In addition to that, what can he do for his children besides?—The Act provides that the amount of provision to the children shall in no case exceed the proportions following, which in the case of three children amounts to three years free rent or value in the whole. If the entailed proprietor has exercised the right of granting an annuity to his widow, to the extent of one-third part of the free rent of his estate, the substitute heir, upon being called upon to pay such annuity, and likewise to pay any provisions which in addition to that annuity the entailed proprietor may have granted, seems to be entitled to avail himself of the following provision of the Act, which enacts, "That in case any heir in possession of an entailed estate shall be sued for payment of the provisions granted under the authority of this Act to the child or children of any former heir or heirs, he or she shall be discharged in all cases from such suit, upon assigning or effectually conveying to a trustee, to be named by the court of Session, one-third part of the clear rents or proceeds of the entailed estate, payable to such heir in possession during his or her life, or until the provisions aforesaid shall be paid off; and the rent so assigned and conveyed

shall

shall be applied in payment of the whole subsisting provisions to a child or children, granted undea the authority of this Act."

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Then are the Committee to understand, that if any proprietor of an entailed estate exercises the full power granted by that statute, of settling one-third upon his widow and three years free rent upon his children, that when the next substitute succeeds he has no power to provide for anybody?—I do not see that he has any power while those previous burthens remain unextinguished.

Is there not a proviso in the Act, that only two life-rent provisions shall subsist at the same time?—There is.

On the falling in of one life-rent provision under that Act, would not the heir in possession have the power of filling it up?—I suppose so.

You have already said that the natural tendency of all men is to provide for their families out of an estate which they hold for their lives?—If they have no other means of doing it.

Consequently it is to be presumed that all heirs of Entail will exercise the full powers granted to them under this statute?—It is highly probable.

Is there any other limit to the full exercise of the powers granted by this statute, excepting the clause you have already read, namely, an assignment in the court of Session to a trustee of all the estate, reserving to the heir in possession only one-third of the rent?—None that I see.

Is not then the natural tendency of such a state of things, that the day is not far distant when all the heirs of Entail in Scotland in succession will only be possessed of one-third of their rents?—It is.

Taking the statute of Lord Aberdeen, which has in the preceding examination been considered separately, in conjunction with the statute of the 10th George the Third, is not that which is probable in the one case inevitable in the other, if the provisions of both statutes are acted upon by the heirs of Entail, namely, that the heir of Entail will be reduced to one-third of the rental of his estate?—It is.

Is not such a result manifestly contemplated by the Act of 5th George 4, wherein it is provided that no heir of Entail shall be deprived of more than two-thirds of his estate?—Obviously so.

And excepting the power given of filling up life rent as a drop scene, will he not also two generations hence be absolutely deprived of all means of providing for his widow and children?—He will.

Is not this in your opinion manifest injustice to the remote heirs of Entail?—Certainly.

Is it not a nibbling at the Entail itself for the benefit of the heirs in possession, at the expense of all the remote heirs?—It is.

Do not the Acts of 1770, and 1824, in fact counteract each others operations?—I should conceive that an entailed proprietor who avails himself of the benefit of the Act of 1824, is in a great measure precluded from taking the benefit of the other, unless he does it from positive hostility to his heir, because the effects are so ruinous to him.

Supposing that the heir in possession takes advantage to the full extent of the Act of 1824, does it not at once preclude his availing himself of the Act of 1770?—I do not know that it does.

Supposing he charges his estate to the extent of two-thirds under the Act of 1824, can he avail himself of the Act of 1770 to the extent of another third?—The clause in the Act of 1824 is "That the powers given and granted by this Act, and by the Act of the 10th of the late King, shall in no case be exercised to such an extent as to deprive the heir in possession of more than two-thirds of the rent." The two-thirds of which he can be deprived are two-thirds falling under the provisions of both Acts, not two-thirds falling under the provisions of one Act. I apprehend that the heir in possession can only burthen the estate under Lord Aberdeen's Act to the extent of one-third, and under the Act of 1770 to the extent of another third.

If the next heir in possession was to do the same thing, so as to exhaust the whole powers by the Act of 1824, then, of course, he cannot avail himself of the powers granted by the Act of 1770?—In as far as I can understand these statutes. I apprehend that the provisions of the two Acts are perfectly separate and distinct, and that any burthens or provisions which are laid upon any subsequent heirs of Entail must be considered separately under each Act. The heir of Entail in possession is entitled under one Act, for the purposes of improvements, to burthen future heirs of Entail to the extent of one-third part of his free rent; he is

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entitled under the other Act, to burthen subsequent heirs of Entail to the extent of another third; but in that way I do not apprehend that an entailed proprietor can, under both Acts, burthen the entailed estate so as to render the burthen effectual to a greater extent than two-third parts of the free rental; always leaving one-third part open to the heir in possession.

But whilst the statute of the 5th Geo. 4, mercifully provides, that no heir upon succeeding to his estate shall be deprived of more two-thirds of that estate, must not the remaining one-third provide for all contingencies, the expense of management, repairs, possible litigation, and even expenditure upon permanent and necessary outlays, such as churches, schoolhouses, manses and the like?—Certainly; and under the statute which passed lately, it is likewise subjected to the payment of three-fourth parts of the expenses incurred in building gaols.

So that the heir of Entail, although protected in some measure by the last clause of that Act of Parliament of 5th Geo. 4, will by no means remain in the possession of even one-third part of his rental for the ordinary purposes of the maintenance of himself and his family?—This income must be restricted to one-third part of the free rental, subject to all the expenses of management, and to the payment of all those taxes, such as building gaols, which are laid upon heirs of Entail.

Supposing a proprietor under Entail, before the passing of Lord Aberdeen's Act in 1824, had availed himself of the full powers given him under the 10th of George the Third, and had laid out in improvements upon the land four years clear income, and in improving the family mansion two years income, that is six years full income; and since the passing of the Act had availed himself to the full extent which the remainder of his rental would allow to provide for his wife and children, and that on his demise the heir of Entail comes into the possession of the estate under these circumstances, and makes a transfer to a trustee of two-thirds of the rent; suppose also that the rental drops, and that it is impossible to sustain both burthens, which creditors have the preference, the creditors under the 10th of George the Third, or the wife and children under Lord Aberdeen's Act?—I apprehend that that is a question that can only be answered by judicial discussion.

Is not that a case perfectly possible?—If rents shall fall.

If the rental drops after the assignment is made, in your opinion as a lawyer, is the heir in possession to have the one-third such as it was granted to him when the assignment was made, or is he to bear his proportion of the decrease in his one-third of the rental?—The court of Session are "authorized and required in each respective case, to give all necessary orders for relieving the heir in possession from the payment of more than such two-third parts of the said free yearly rent or yearly proceeds as aforesaid, by authorizing such heir to retain any excess beyond the same, from the security or prosivion or securities or provisions on such entailed lands and estates, which shall be least entitled by the law of Scotland to legal preference."

If in the case which has been put, the court of Session should decide that the reduction of rent should not fall upon the two-thirds already assigned by preceding possessors, but upon the one-third reserved to the heir in possession, is it not possible to conceive a case, in which the heir in possession might be reduced to little or nothing?—I can very easily conceive a case in which the heir in possession may be reduced to such circumstances that he is not qualified to fill the duties of his station in society, in so far as depends upon his pecuniary circumstances.

Do you conceive such operation of the statutes to be conducive to the dignity or the independence of the aristocracy and landed interest of Scotland?—Quite the reverse.

You are aware, that the last clause in the Act of 1824, provides, that in no case the heir in possession shall be deprived of more than two-thirds of the rental; might not that clause become inconsistent with the other provisions of the Act, supposing that rents fell so that those two-thirds would not satisfy the incumbrances which had been imposed by these two Acts?—The question would remain for discussion, upon whom the loss should fall.

There are three parties in this case, there is the successor to the entailed estate, there are those who come under the provisions by the old Act, and those who come under the provisions by the new Act, and you would feel a doubt which of the three are to suffer in case of a scarcity?—Yes, there must be a loss to fall among them, and how that loss should be divided I consider to be a question that is not decided by the Act.

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Do you not consider that the heir of Entail, having given up to a trustee two-thirds of the free rental, is entirely exonerated from any further liability?—I should think, that having once given up two-thirds of his rental, it would afford him a very strong plea against any further liability.

You mentioned yesterday, that there are other Acts of Parliament enabling heirs of Entail in possession to charge their estates, besides the Acts of 10 Geo. 3, and 5 Geo. 4, now supposing a heir of Entail in possession were to make use of the powers conferred on him by those Acts, would he not still further diminish the income that would be enjoyed by the next substitute who came into possession of the estate?—Certainly; because in this Act which provides, that the heir of Entail shall have one-third of the rent, the burthens are calculated only upon those two Acts, without reference to other Acts.

So that those additional charges which he is entitled to make under the other Acts of Parliament, diminish the third that would descend to the next substitute?—Yes.

If any burthens upon the estate are laid on in consequence of those separate local Acts, are they not as much burthens upon the estate as any other burthens, and would they not come into a computation of the amount of the burthens upon the estate, as much as any other burthens?—I should think so, in fixing the third.

Suppose that the heir of Entail in possession, exhausts all the powers vested in him by the Acts of 10th of Geo. 3. and the 5th of Geo. 4. would he not be enabled to charge the estate further under the general Turnpike Act of Scotland, in addition to the charges he had made under the two former Acts?—I should think, that his having given up two-thirds of his rent would not exclude the claim for the payment of the expenses of building gaols and charges of that sort subsequently incurred, which would fall upon the heir of Entail out of the remaining third of the rent of the entailed estate.

Do you extend the same observation to the charge of one year's rent, that he is enabled to make under the general Turnpike Act?—Yes.

May substitute heirs in succession burthen their estates, under the general Turnpike Act, to the amount of one year's rent, without limit?—I believe, there is no limit in the statute.

Then such burthens under the general Turnpike Act, might in time absorb or nearly absorb the remaining third part of the income?—The expenses of building gaols are divided over the heritors of probably an extensive district, and therefore do not fall very heavily upon one heritor, unless his rental is very great.

Might not a succession of heirs of Entail, by making successive charges in virtue of the powers vested in them by the Act, get rid of the third reserved for the substitute heir of Entail in possession?—Yes.

Is there any thing in the law to prevent substitutes in succession, from absorbing the remaining third part of the estate, by imposing burthens upon the estate under the Turnpike Act and other Acts of that description?—To the extent authorized by the statutes, I can see nothing to prevent them, provided they limit the extent to one year's rent.

Might not the charge of one year, imposed by a number of substitutes in succession, absorb the remaining third part of the income?—It might.

Is not the heir of Entail constantly liable to heavy burthens for the repair and erection of churches, manses, schoolhouses and schoolmasters houses, applicable to the estate as to which he may be burthened, in the manner you have stated?—He is, with all the proprietors of the district.

More than all; is he not compelled to defend the estate, the two thirds assigned, as well as the one third he enjoys, against all law proceedings in the courts of Scotand, and even in the House of Lords?—He must maintain and protect the rights to the whole property, although his income may be reduced to one third part of the rental.

That is to say, he must defend the two thirds assigned, as well as the one third that he keeps out of the income he derives from the one third?—Yes.

After the detailed evidence you have given, will you state your opinion generally as to the effect produced by the creation of restraints upon and in the administration of landed property under the Act of 1685?—I am of opinion that the creation of restraints on the uses of landed property in Scotland, and on the power of granting securities over it or alienating it for onerous causes, by which an entailer restricts the heirs of Entail to the remotest posterity, in the natural and beneficial administration of the entailed estate, and precludes them from the sources of credit usually

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afforded by the possesion of property in land, is inconsistent with the advantageous management of such property, either for the possessor or the public; and that this system of entailing has been carried to an extent injurious to the best interests of the country, by excluding from commerce a large and annually increasing proportion of the total soil of Scotland; and injurious also to the interests of the entailed proprietors themselves, as obstructing agricultural and other improvements, and as depriving them of the means of providing adequately for their families without extremely embarrassing the subsequent heirs of Entail.

Will you state your opinion in conclusion, as to the effects produced by the remedial statutes enacted as palliative measures; and whether in your opinion palliative measures might be enacted, which would be adequate to remedy the evil stated to exist under the Act of 1685?—I am of opinion, that any palliative or remedial measures which it is possible for the legislature to adopt, unless accompanied with measures of a general and comprehensive nature touching the principle and limiting the operation of Entails, must be ineffectual for obviating the evils, and will in most cases be delusive and fail in their intended object of materially and permanently improving the condition of entailed proprietors; while the remedial statutes now in operation, if fully acted upon, will have the effect of reducing a very large proportion of the entailed proprietors (whose territorial possessions already extend to about one half of the kingdom) to a situation in which they cannot adequately discharge those duties of their station in society, upon which their public usefulness and respectability and their private independence, comfort and happiness so much depend.

Have not the decisions given, within the last few years, respecting grassums aud the power of granting long leases, materially altered the situation of heirs of Entail under the statute of 1685?—They have altered it in a very material respect. Previous to those decisions, it was in the power of every entailed proprietor, upon granting new leases, to enter into an agreement with the tenants, by which the rent payable should not be under the former rent; and the additional benefit that might be derived to the proprietor, from the increased value of the property, might be given to him in the form of a grassum or a fine, and in that way he could apply the grassum or fine as the source for providing for his younger children. In doing so, unquestionably he did no benefit to the heir of Entail, because it could not be expected, that the property was to be so well managed, where the tenant was to pay a grassum at the commencement of the leases, as if he was to pay a yearly rent, which he might have been enabled to increase to a much greater sum, in the course of annual payments, than by one large sum at the commencement of the lease.

If any two points were considered settled in the law of Scotland, till the decisions in the Queensberry cases, were not these two points considered most settled, namely the right of heirs of Entail to grant long leases, and to take grassums under the statute of 1685?—I believe there was not a lawyer in Edinburgh that doubted about it, that long leases might be granted if not specially prohibited by the Entail; and that grassums or fines might be taken unless there was a special prohibition in the Entail guarded with the proper clauses.

Has not the confusion arising from the reversal of what was so long considered the settled law of Scotland, produced great additional inconvenience in the working of the statute of 1685?—It has placed the entailed proprietors of Scotland in so far in a different situation from what they previously conceived they stood in.

Is an estate liable to the debts of the entailer due at the time of his death?—It was understood that an entailer had no power to make an Entail by which he could exclude creditors from recovering payment of the debts due by him. An entailer's debt was always considered as a burthen upon the property.

According to recent decisions, cannot an owner in fee by an Entail on himself and his heirs, place his estate beyond the reach of his creditors, for all debts he incurs after infeoftment?—It was so decided in one case. But I should mention, that in that case there were likewise special circumstances. It was a case in which there were mutual Entails of two estates, and therefore the Entail was considered as proceeding from onerous causes as it is called in Scotland, valuable considerations, and in that case it was found that the Entail was effectual to bar the claims of the creditors of the entailer.

Are not all marriage settlements held to be onerous deeds?—They are.

Consequently all Entails under marriage settlements, would, according to that decision, bar the claims of all creditors of the entailer subsequent to the deed of settlement?—I conceive that to be the consequence of the decision.

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Is it still doubtful, whether gratuitous Entails are effectual against the creditors of the entailer, or no?—That point is not decided.

But an onerous Entail is effectual after infeoftment, against the creditors of the entailer?—Against those creditors who have not completed their title by infeoftment previous to the time when the entailer's title was completed by infeoftment.

Is not such a state of law very prejudicial to the just rights of creditors, in your opinion?—The state of Entail law is altogether prejudicial to the just rights of creditors.

By the law of Scotland, is not a real estate, which is unentailed, liable to the simple contract debts of the owner?—Yes. By the law of Scotland, the creditors of every proprietor, whose estate is not entailed, can attach his heritable estate as well as his personal funds, for the payment of his debts.

Therefore that which is apparently a just provision in defence of creditors, can be defeated by an individual entailing his property for onerous causes, among which marriage is considered one?—Under the decision which has been mentioned, he may.

Can he do it if the creditors have completed their titles?—Not with regard to those creditors who have obtained infeoftment upon the estate previous to the entailed proprietor having done so.

Therefore the entailer cannot entail his land to the prejudice of a creditor who has completed his title to his debt?—No.

Is it not the general law of Scotland with respect to unentailed estates, that simple contract debts and special contract debts are both good against the land?—Every debt. In order to make the matter perfectly distinct, with regard to the last decision, I shall state in substance the terms of the judgment in the case of Agnew. It was decided that the estate was affectable *only* by such debts as were due at the time of the date of the deed of Entail, and which remained due at the time of the entailer's death, and with such other debts, as although not contracted at the date of the Entail, had become real charges upon the estate before titles under the entail had been completed by infeoftment; thus excluding creditors for debts contracted after the date of the Entail, from recovering payment out of the entailed estate, unless in so far as secured by infeofment prior to the infeofment upon the Entail.

In your long experience in the practice of the law in Scotland, are you able to state that there is more litigation in proportion in cases of entailed property, than of unentailed property?—There must necessarily be so, because entailed property comprehends and includes all the discussions and disputed points that occur in the case of legal investitures of unentailed property; and in addition to that it likewise includes all those questions of discussion and dispute which arise from the peculiar law of Entail.

Is not there one great class of questions which affect unentailed property, namely, questions arising upon the transfer of property which is entirely excluded from entailed property?—There can be no transference of entailed property.

Does not that therefore exclude a very large class of legal questions?—I do not conceive that the mere question of transference of property, is calculated to involve litigation to a very great extent, because the deeds of transference are well ascertained.

What are the points under the law of Entail, upon which, according to your experience, the greatest litigation arises?—Upon all the various prohibitions contained in the Entail.

You mentioned a clause in the early part of your evidence, requiring the adoption of the name and arms very often inserted in Entails; does not that produce much litigation?—There has been litigation upon that point, how far the heritancy was incurred under that clause.

Are you, from your knowledge of the operation of those laws, enabled to state whether there is much difficulty arising from disagreements between parents and their children, under Entails?—There have been instances of that.

Are those instances numerous, so far as your knowledge enables you to state?—I do not know that they have come into numerous subjects of discussion before courts, but they are calculated to lead to unpleasant feelings sometimes between the parties.

Then from the general tenor of your evidence, the Committee are to understand

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that your opinion is, that there would be less litigation, provided the law of Entails was altered, than there is at present under the existing law of Entails?—If it was judiciously altered; it might be altered in such a manner as to increase litigation, but if the alterations were judicious and proper, I conceive there would be less litigation.

Do you imagine that, by the subtraction of so large a quantity of land from the market, the price of land in Scotland is very much raised?—I think it tends very much to raise it.

Is your ground for supposing that, merely that that would naturally be the consequence of subtracting a large proportion of land from the market; or is it founded upon any facts that have come within your observation?—It is founded upon general experience, that the price of land like that of every thing else, must depend upon the quantity of it in the market, and the price must rise and fall according to the quantity in the market.

What is the number of years' purchase at which land is bought and sold in Scotland generally?—It has varied at different times. About the year 1812, and for some little time after that, when speculations in land were very extensive, I believe about twenty-eight or thirty years purchase was not an uncommon price. Now, I believe, twenty-four years' purchase may be considered as the usual price in general properties. There may be properties having peculiar advantages for which higher prices would be given, but I presume, that about twenty-four years' purchase of clear rental would now be considered as the price that might be expected in ordinary properties having no peculiar advantages.

Are you aware of the ordinary price of land, by the same calculation, in England?—No, I am not; and as far as I have understood, I think it would be difficult to draw a comparison; because in England I understand that so much depends upon the parish rates and poor rates and other considerations of that kind, which are not applicable to Scotland, that it would be difficult to make a fair comparison between them.

Should not the exemption from such charges as those, rather raise the price of land in Scotland than lower it?—It has that tendency. Every person in Scotland either selling or purchasing land, can ascertain pretty nearly what those charges are, so as to establish a clear free rental. I do not know if that can be done so easily in England.

Then you are not aware, from any comparison you have made, whether the price of land in Scotland, as computed by the number of years' purchase, is higher than the price of land by the same computation in England?—I am not; I do not feel myself entitled to speak upon the subject.

James Glassford, Esquire, called in; and Examined.

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HAVE you, from your long and extensive knowledge of the law of Scotland, had occasion to turn your attention to the law of Entail in that country?—I have had occasion to give a general attention to the subject of the Entail law in Scotland. I cannot say that my former experience at the bar gave me many opportunities of entering into the discussions or niceties of that law, and having many years ago withdrawn from the bar, I have not had opportunities of becoming much acquainted with the recent decisions of the courts. At the same time, upon the general question, I have formed opinions with respect to the consequences of the statute 1685 and the operation of that statute, and also as to the operation of some of the remedies that have been provided for the correction of the inconveniences arising under the system of Entail, more especially the provisions of the Act of the 10th Geo. 3; I have not had occasion to pay particular attention to the provisions of the Act in 1824, farther than to observe what those general provisions are, and combining them with the operation of the previous statute to form some opinion as to the result. I have had some experience personally of the effect of Entail law.

Confining your observations at present to the operation of the Acts of 1685 and 1770, and the general nature of the system of Entails in Scotland, and not calling at present for any observations upon any proposed remedy for the evils supposed to be connected with it, can you favour the Committee with any statement of your views on this subject?—Understanding that I should be called upon by the Committee to give some evidence upon this question, I took an opportunity of putting into

into writing the general views I had formed upon it, not entering very minutely into all the parts of the subject, but stating briefly my reasons for the opinions I entertain; I shall, if permitted, deliver those Observations to the Committee.

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[*The Witness delivered in the same, which was read, as follows:*]

THE Objects of a Scotch Entail, such as the law may be supposed to contemplate or sanction, seem to be, the support of an hereditary aristocracy as a political advantage, and the prevention of profligate waste and expenditure by heirs, as a measure of prudence and private expediency; and the right of making such settlements is supposed to be founded on the power of a proprietor of land to dispose of that property under such conditions as he thinks proper.

This foundation, however, will not support the system of Entail to the extent authorized by the Scots Act 1685, chap. 51, which is evident from the circumstance, that the aid of the statute was thought necessary for the support of these settlements. But independent of this, the natural and useful powers of a proprietor of land, correspond to those of the proprietor of any other subject; namely, to use that property in any way not inconsistent with the rights of others, and not forbidden by the law on views of public advantage; and to dispose of that property while he still retains the power over it, under any conditions he pleases, subject to the same limitations. Beyond this a proprietor of land has not, on what may be called his natural right to the use and disposal of it, a claim to prolong his influence over it so as to limit the same rights and uses in those who follow, excepting so far as he has otherwise from natural relation or duty, a power of controul over such persons.

The disadvantages of Entail settlements, when carried to an extent such as that supported by the Scotch law, are two-fold; either affecting the public at large, or affecting more particularly the Entail proprietors themselves.

The system confers upon individuals a disproportionate and almost unlimited power over the most important possessions and rights of a succeeding generation, not only after the individual who constitutes the Entail, has long ceased to have any interest in the matter, but for a period of time to which the utmost human wisdom is unable to reach; so that instead of continuing to be a prudent and wise arrangement, and which the same person would, if alive, have carried into effect, it may become directly the reverse, and be one which, if he had existed under these new circumstances, the entailer himself would have revoked or rectified. In this respect it may be as injurious as if the legislature of one age could tie up the hands of succeeding legislatures, for a century or a longer period, from altering a statutory enactment, which was perhaps expedient when it passed, but has become inexpedient or mischievous. The interests of society require therefore that there should be some limit, and that not placed at a very remote distance, where the power of individuals to legislate even for their own family and posterity, and still more for successors to their property, who may be strangers to them as to any ties of relationship or natural interest, ought to cease; that is to say, ought not to be supported by special statutory enactment. According to the present Scottish law of Entail, the wisdom of an individual is raised above the wisdom as well as the interest of many successive generations.

But in addition to this view, which places the interests and feelings of the original entailer in contrast with the interests of society, and of a long and remote series of descendants or disponees, who are governed and restrained by his will,—another important objection to the plan is, that so far from effecting the real and substantial objects of the right of entailing, namely, a prudent protection of the property from an improvident heir, and the benefit of the persons to whom the succession is thus secured; a prospective settlement of such unlimited duration often defeats much more effectually those very objects, and produces greater evils, and for a long series of time.

The benefit of Entails as supporting a hereditary aristocracy, is now left out of consideration. The expediency of legislative interference for such a purpose, is at best questionable; and if well founded, it would scarcely apply to a system which supports all such deeds, however limited the extent of the property, and under whatever conditions imposed; besides that, the real advantages sought for even in this respect may come to be also in a great measure counteracted and defeated by those changes in the circumstances of society, which counteract and defeat the more private and substantial objects which the individual had in view. The same remarks therefore apply to both.

In alluding briefly to some of the inconveniences which have been produced, both to society and to the individuals concerned, by the system of strict Scottish Entail, it is not necessary to draw a marked line of separation between them. The community and the individuals holding their property under such settlements, suffer nearly from the same causes; and there is scarcely any Entail of long endurance which does not produce injury to both.

1st.—The commerce and transmission of land is obstructed by these settlements, and may be so to a great extent, and over large districts of territory. In a commercial and trading country the disadvantages are obvious. The Entailer who wishes to establish and continue a family, may in the exercise of this power find some motive for his industrious exertions. But the stimulus even to this extent terminates with himself. The incentive is by the same act taken away from his heirs in the line of succession, and a contrary influence that of indolence or indifference, is substituted.

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2d.—The improvement of such estates by advanced methods of culture, and the progress of invention, is discouraged and rendered difficult through the restraints placed on the proprietor, by his limited means, and the limited interest which he has in making such ameliorations.

3d.—Not only is improvement retarded, but a system of mismanagement may be perpetuated. For individuals making Entails may do so under very imprudent and unwise conditions, not indeed for the purpose of wasting the estate, but through some narrow policy of an opposite kind, or perhaps under the influence of some wrong bias or partial view, or from mere caprice, which thus comes to be upheld by the sanction of the law.

4th.—One great principle and rule of the Scotch law itself is violated by the system; more important, perhaps, than any advantage which society at large can derive from the power of entailing, namely, the right, which at common law in Scotland, the creditor has to obtain payment of his just debts from property of every description belonging to his debtor. The Entailer himself, indeed, is not so protected, but the succeeding heirs under a strict Entail are exempt from the operation of the common law, so far as the estate itself (separate from his life interest and the annual produce in his time) is concerned. It is true that the creditor has it in his power to ascertain, whether a proprietor is thus fettered, and without this precaution, ought not to give credit on the estate; but *practically* this is not an effectual safeguard, for in the ordinary transactions of life people do not think of consulting the records before they deal with a landed proprietor. In lending large sums of money, they or those whom they employ will do so, but not in ordinary dealings even to a large amount. Nor is this an imaginary or even a rare case, but occurs every day, and cannot be avoided.

5th.—The evils of the system are equally or even more strongly felt by the persons immediately concerned, namely, by the heirs of Entail themselves, who may be and often are put to the most serious inconvenience, and without any improvidence or fault on their part, by not having the power of borrowing money, even for prudent and useful purposes, and to the most moderate extent, on the security of their estates. This is, indeed, a necessary condition for the support of the system; for otherwise, if they could give a real security effectual against the property (as well as their interest in it) Entails could not be protected. But still the evil is real and great, for it is not the spendthrift only who is thus restrained, but the provident proprietor is also fettered, and it may be to the disadvantage of the estate as well as of himself personally. Or, if from the necessity of his situation, under an injudicious Entail or unforseen causes, he is obliged to attempt a loan, he must have recourse to inconvenient and expensive modes of satisfying his creditor by life insurance, sale of his interest in the estate, or similar methods.

The same observation applies, of course, to the prohibition against selling, which is equally or still more necessary for the support of the Entail, but not less injurious often to the provident manager and possessor, and not a restraint merely on the improvident. For an estate under strict taillie, burthened as they often are with debts of the entailer himself, may, through changes in the state of society, fall in value so considerably, that the most expedient and the wisest plan would evidently be to sell a part of it, in order to disencumber the remainder, and save expense of management and other outlays. But the only mode of accomplishing this, by a legislative interposition, is so expensive, and if opposed by the other heirs substitutes, may be so uncertain through a protracted litigation, as to defeat the whole benefit of such an attempt.

In these and other ways not less injurious which might be mentioned, the heir in possession may be, and sometimes is, reduced not merely to be a life renter only of the estate, but to a condition of great difficulty and hardship, and in some cases becomes a mere holder of an unprofitable succession for the benefit of the after substitutes, who will reap the fruit when an improvement in society and a rise in the rents shall take place.

6th.—The *estate itself* may, from such causes, come to suffer materially, as well as the present possessor; and that even permanently or for a long period of time. For the heir of Entail in possession may be without the means of laying out those sums, even in the proper management of it, which, to secure a future advantage for the property, would be highly expedient, and which if he had the usual facilities for doing so, it would be prudent to advance. Or he may have little motive and interest to employ the means which he actually possesses. The heir of Entail for example, on whose death the estate is to descend to a distant collateral or even to a substitute, who is quite a stranger to him, has comparatively little interest in laying out large sums, even on the requisite improvements—such as building farm houses, draining, planting, &c. He has an interest to take the most he can from the property, and to do the least for it. He has even an inducement to commit waste, by cutting more timber than he ought, and in other ways to lessen the value of the estate to subsequent heirs with whom he is unconnected. Or if he does not yield to such inducements, he may, as has been observed, find it impossible, if he does not possess separate funds sufficient for the purpose, to adopt any liberal course of management.

It was to remedy the evils which have been enumerated, or some of them, that the Statute 10 Geo. 3, chap. 51, was introduced for the relief of heirs of Entail making improvements on the entailed property. But the provisions of that Act and of the late Statute 5 Geo. 4. chap. 87, are accompanied with many conditions and qualifications, and after all do not strike at the root of the evil.

The remedial measures provided by the 10 Geo. 3, occasion considerable trouble and inconvenience to render them effectual. They may be defeated by the neglect of some minute statutory

statutory condition; they require the interposition of the courts of law nearly at every step; and the requisite precaution of taking decree against the other heirs of Entail, occasions expense, and in some cases the methods of obtaining payment from them, are intricate and somewhat uncertain. After all, the relief afforded in the most material points, is only important as creating a fund of credit on which money may be borrowed, and this debt must be kept up against the subsequent heirs, by transference of the securities to the lender.

It is to be observed also, that the lender advances his money under some degree of risk; because the statute confers no power, even under the sanction of the courts of law, to sell, or effectually to charge, any part of the estate itself; but only a power to enforce payment of the debt from the succeeding heirs, and this too under certain conditions imposed. The relief therefore is neither immediate nor certain.

Lastly, supposing these difficulties overcome or lessened, still the remedy provided is for the benefit of the heir in possession only; and from the encouragement, which he thus derives to improve the estate, another and scarcely inferior evil arises—namely that the burthen instead of being extinguished, is only transferred to the succeeding heirs of Entail, who consequently may receive the estate under such encumbrances, arising from these acts of management, as reduce them in turn to a state of equal or even greater difficulty. The original burthens remain where there are Entailer's debts, and to these are superadded new incumbrances under the head of improvements, while the public burthens, and the expense of management over the whole estate, still continue.

The provisions of the late statute 5 Geo. 4. when it shall come into full operation, must add greatly to these embarrassments in the way of the succeeding heirs of Entail.

7th.—Connected with this view of the subject, is the general objection to the strict Scotch Entails, and also to the very remedies which become necessary for removing it, that by encouraging so much the desire of establishing a family and name in a line of male heirs, the other children of the Entailer, and those of his heirs of Entail, are neglected and excluded from their proper portion of their father's fortune:—At least it is in the power of the original Entailer so to frame his restrictions as to produce this effect; and the alterations which the change of society renders equitable and expedient, in the amount of such provisions, cannot be followed on account of these fetters. On the other hand, if the legislature interferes and provides a remedy for this evil, the yearly income from the estate becomes, in consequence of other restrictions and other burthens, overcharged by such provisions, in the same way as by other provisions for the amelioration of the estate itself.

Hence the late statute 5 Geo. 4. c. 87. however equitable in its intention, has by laying a great additional burthen upon succeeding heirs, increased materially the difficulties of the case.

In short, an artificial state of property, of rights, and of burthens, is introduced by the system of Entails, which does not allow the changes of events, and the successive conditions of society, to have their proper issue; and by requiring frequent legislative interference, disturbs and inverts the common law rights both of the holders of such property and of the commonalty at large.

The general feeling of other classes of society, upon the subject of Entails, is proved by the frequent and still recurring attempts made to break them down on even the slightest flaw, and most trivial objection; and by the countenance which some decisions of the courts of law are supposed to have given to such attempts, which if these settlements were proper and useful, could not have occurred. Even the litigation which has been occasioned by this contest of feeling with the law, is itself a great evil to society, as well as to the individuals concerned.

The observations which have been made, apply of course to those strict settlements of Entail which are supported by the Act 1685, containing irritant and resolutive provisions, and more especially to such as are devised to a series of heirs beyond the immediate descendants or family of the entailer. To deeds of a more limited nature, and the exercise of a more restricted power, the same remarks would not apply, at least not in the same extent.

It is also proper to add, that the case of particular individuals who may derive important benefit under such settlements, and the peculiar circumstances which may exempt them from the inconvenient consequences of the law of Entail, are not taken into account in a question affecting as this does the general interests of society.

Perhaps, at the time when the Act of 1685 was passed, some of the evils stated were not so strongly felt, and were not anticipated. Commercial views had not the extent or influence which they now possess; the sympathies with primogeniture and clanship were stronger; and the feeling of all classes of people was less at variance with the objects and supposed interests of the feudal proprietor.

Jovis, 20° die Martii, 1828.

THOMAS FRANCIS KENNEDY, ESQUIRE,
IN THE CHAIR.

Patrick Cockburn, Esquire, called in; and Examined.

Patrick Cockburn, Esq.

HAVE you been engaged very extensively in business for a long period of years in Edinburgh?—I have.

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Having been connected very extensively in business with Mr. Charles Selkrig?—Yes; I went as a clerk to Mr. Selkrig in 1797, and I entered into partnership with him in 1804, and have continued in business with him since that time. Mr. Selkrig has retired from business a good deal for these two years past.

Have Mr. Selkrig and you during that period been in the habit of conducting very large and extensive affairs connected with Entailed estates in Scotland?—Yes; we have had the general superintendence and management of several Entailed estates. Mr. Selkrig is trustee upon some of the estates, and I assisted him. He and I were joint trustees upon some estates; and I have been trustee upon one estate myself.

From the experience you yourself have had, is it in your power to afford to this Committee any information connected with the law of Entail, as affecting property in Scotland?—I have had occasionally an opportunity of considering the law of Entail in cases that occurred in those trusts in which Mr. Selkrig and I were concerned, and in which I have been concerned myself; and I humbly conceive it is in my power to give the honourable Committee some information upon the subject.

Have you of late directed your attention in a very particular manner to this subject?—Yes, I have, since the question was agitated in Scotland, which I think was about the month of August last. Mr. Selkrig published a short pamphlet with respect to the law of Entail, and I have had a good deal of discussion with professional gentlemen upon the plan proposed by Mr. Selkrig in that pamphlet, and upon the law of Entail. Since I came here I have made up a short statement of what I conceive to be the law of Entail in Scotland, with some preliminary remarks respecting the rules of succession *ab intestato*, and by deeds of settlement at common law; and with the permission of the Committee I will deliver it in.

[*The Witness delivered in the same, which was read as follows.*]

STATEMENT of the Law of ENTAIL in *Scotland*, &c.

Rules of Succession, *ab intestato*.

BEFORE proceeding to state the law of Entail, it may be necessary, for the information of such of the hon. Committee as are not acquainted with the law of Scotland, to mention some of the leading rules of succession, *ab intestato*. 1st. The law of Scotland recognizes the rule of primogeniture among males; the eldest son of a family succeeds to the landed property of his father;—and 2dly, failing male issue, the whole daughters succeed equally as Heirs Portioners, as they are called.—3dly. The law of representation prevails in Scotland in the succession to landed property, though not in the succession to moveables. The son of the eldest son, or even the daughter of the eldest son succeeds, in preference to the second son of a family.—4th. With regard to collaterals, there is a distinction between what are called Heritage and Conquest. Heritage; that is, an heritable right of property, to which the possessor has succeeded *ab intestato*, goes to the immediate younger brother. Conquest, or property acquired by a disposition either onerous or gratuitous, goes to the immediate elder brother.—5th. Failing brothers and descendants from them, the succession goes to the whole sisters as Heirs Portioners or their descendants; the representative or representatives of each female taking the share that would have belonged to the mother. 6th. Failing collaterals of the first degree and their descendants, the succession ascends, and goes first to the father, and failing him, to the uncles and aunts and their descendants, according to the same rules that regulate the succession of collaterals of the first degree.—7th. Failing the father and collaterals of the second degree, the succession goes to the grandfather, and his brothers and sisters, and their descendants, according to the same rules; and so on.

On these rules of succession, the law of Scotland is, I believe, similar to that of England; but there is one point in which it is material to observe, that they differ. In Scotland, (except in the case of succession to the title of peerage) no heritable right vests as in England *jure sanguinis*, or by notoriety; every heritable right must be taken up by service; that is, by the verdict of a jury proving the propinquity. An apparent heir may, no doubt, enter to possession, and enjoy the rents of the estate of his predecessor in virtue of his apparency, but there are some important rights of property which cannot be exercised, by an apparent heir, not entered and infeft in the property; and upon the death of such heir without service, the

the next heir does not take the property as heir to the person who possessed upon apparency; but in order to be vested in the property must serve heir to the person who died last, vest and seized therein, or who had a personal right thereto, in virtue of a disposition upon which infeftment had not followed.

The service as heir to a person deceased, draws this important consequence after it, that the heir becomes liable for the whole debts and obligations of the predecessor to whom he succeeds, and also to the debts and obligations of any apparent heir who may have been three years in possession, and whom he may have passed over in his service to the more remote ancestor.

These are the principal rules of succession *ab intestato*, to which, it occurs to me as necessary to draw the attention of the hon. Committee, for the purpose of understanding the law of Entail and the consequences resulting from it; and before proceeding to statement of that law, it may be still further proper to consider some of the rules respecting testamentary succession in Scotland, independent of that modification of the law, which was introduced by the statute 1685, c. 22; and also to consider the extent to which property may be limited at common law, by deeds of settlement and marriage contracts.

Rules of Testamentary Succession.

Without entering into the question at present, whether or not it was competent by the law of Scotland, previously to the enactment of the statute 1685, to make Entails for a perpetuity which would be effectual against creditors and singular successors, (a matter not altogether free of controversy at the present day,) I shall merely state, that by the common law it is undoubtedly competent to every absolute proprietor of a landed estate to appoint his immediate successor, and also if he thinks fit, to limit the interest of that successor to a bare life-rent; in which case the successor cannot dilapidate or spend the estate, nor does it become subject to his debts or deeds; all that he is entitled to, is the use of the estate during his life.

There are various modes of creating life-rents, and the expressions which are used for that purpose have often given rise to intricate and difficult questions. There is a maxim in the law of Scotland which I believe also holds in that of England; there cannot be a life-rent without a corresponding fee; the fee cannot be *in pendente*; this arises, I presume, from heritable rights being formed upon the principles of the feudal law, which required that the superior should always have a vassal. In Scotland, a life-rent is considered as a burden upon the fee; the fiar is the proprietor of the estate.

What gives rise to questions upon this point, is the difficulty that frequently occurs in ascertaining in whom the fee is vested. This depends not merely upon the expressions used in the settlement by which the right is created, but upon the circumstances and relative situations of the granter and grantees, and of the grantees between themselves.

I shall mention several modes of expression by which a co-existing right of life-rent and fee may be created.

The most simple mode of creating a life-rent and fee, is by a person disponing an estate to *A.* in life-rent, and *B.* and his heirs and assignees in fee. Here the estate of *A.* is a mere life-interest. *A.* is the tenant for life. The fee is immediately vested in *B.* and co-exists with the life-rent, and is not liable to the debts or obligations of *A.* the life-renter.

2d.—It frequently happens that an estate is devised by a person to himself in life-rent, and to his heirs male or to the heirs of a marriage in fee. If this be a gratuitous deed, the fee remains in the father, notwithstanding the destination: but if this destination is made by a marriage contract, the contract being an onerous deed, creates a personal obligation on the husband not to defeat the destination, and he cannot do so by any gratuitous deed. The husband, however, is in the fee, and the estate is liable to his debts and deeds in a question with third parties.

3d.—It is not easily presumed that a man divests himself of the power of disposal of his estate during his lifetime; yet if an intention to do so be clearly expressed, it will have effect. Thus, if by a marriage-contract or other deed, a man dispones an estate to himself in life-rent *for his life-rent use allenarly*, and to his heirs of the marriage in fee, here the expression "for his life-rent use allenarly" (or *only*) is held to denote the clear intention of the party to restrict the right of the husband to a bare life-rent. It puzzled lawyers, however, to find where the fee resided in this case, and it was decided that as a fee could not be *in pendente*, it vested in the father, but that it was a *feduciary fee* for behoof of the children, and not liable to his debts and deeds.

4th.—If an estate is devised to a man and his wife in conjunct fee and life-rent, and to the heirs of the husband in fee, the fee is in the husband, and the right of his wife is an eventual life-rent after the death of her husband, and this right of life-rent cannot be disappointed by any gratuitous deed of the husband.

5th.—If the estate is devised to a husband and wife in conjunct fee and life-rent for the husband's life-rent use allenarly, and to the heirs and assignees of his wife, the fee is in the wife and her heirs, and is not liable to the debts or deeds of the husband; he has merely a life-rent during the marriage, in right of his *jus mariti*, and an eventual life-rent in case of his surviving the wife.

These are some of the usual modes by which property is destined by settlements according to the law of Scotland, which it may be necessary to keep in view in considering the law of Entail. I believe it is seldom that property is destined to life-renters in succession, that is to *A.*; whom failing to *B.*; whom failing to *C.*, &c.; but I do not know that there is any thing in the law of Scotland to hinder this, provided *A. B.* and *C.* be named in the deed; neither do I know that there is any thing to prevent a destination to *A. B.* and *C.* &c. and the *survivors* and *survivor* of them in life-rent. I apprehend, however, there must always

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always be a co-existing fee, and I should doubt the competency of creating a series of life-rents to take place one after another, in favour of persons not named in the grant, or not in existence at the date of it. Such a destination would partake of the nature of an Entail, and could not I apprehend, (I speak with hesitation) be supported, except the deed were executed in terms of the Act 1685, establishing the law of Entail; and the difficulty that would arise, were such an Entail attempted, would be, that the life-rents must be supported by a corresponding fee, and unless restrained in some way that I do not contemplate, the fiar might dispose of the property.

There is one way, perhaps, in which a species of Entail could be created in Scotland independent of the Act 1685, and that is by means of a trust for the use of a series of life-renters, described in the deed. The fee might be put in the person of a number of trustees and the survivors, with power to assume new trustees in succession, and the trust might be declared to be for the use of such and such persons or heirs described in the deed; and a perpetuity of succession thus created as long as the trustees chose to act. I do not say that such a species of Entails would be supported by decisions of the courts of law, because owing to the creation of a system of Entail, by the Act 1685, it has been unnecessary to resort to any such expedient for the creation of perpetuities, and no such form of deed, so far as I know, has been adopted by practitioners; but I have no doubt, were the Act 1685 repealed *in toto*, without substituting some other restriction on the powers of creating rights of succession in perpetuity, the ingenuity of lawyers would be immediately set to work to devise some new plan by which the propensity of individuals to perpetuate their names and preserve their estates in their families might be gratified.

Having stated these preliminary observations as to the rules of succession *ab intestato*, and some of the rules which govern the interpretation of dispositions and settlements of heritable property at common law, which I hope the honourable Committee will not deem inapplicable to the subject under their consideration, or to the question that has been put to me, I shall proceed to state some leading features of what I conceive to be the law of Entail in Scotland.

Description of Entails.

The word Entail or Tailize, as it is used by institutional writers, is a generic term, and comprehends all dispositions of heritable property to a person who is called the institute, with the substitution of a series of heirs, who are called to the succession, one after another, and are denominated Heirs of Taillie. A Taillie or Entail, in the general acceptation of the term, is a deed by which the right of succession of the person or persons, who would have succeeded as heir or heirs by the common law, is cut off, and the order of succession is made to diverge to a different species of heirs, such as heirs male, or the eldest heir female, or to any person or persons nominated upon the failure of certain heirs, named or described in the grant.

There are, as I conceive, three species of Entails; 1st, settlements containing simple destinations without prohibitory, irritant and resolutive clauses; 2d, settlements containing prohibitory clauses, without irritant and resolutive clauses; and, lastly, deeds of settlement or Entail, containing prohibitory, irritant and resolutive clauses. These different species of Entails have different effects.

Simple destination.

1st.—A disposition and settlement, which has merely a simple destination, without prohibitory, irritant and resolutive clauses, although it is not so effectual as the other two kinds of Entail, may contain as many substitutions of heirs as the granter thinks fit to insert. The usual form in which such settlements are conceived is to *A.* and the heirs male of his body, or heirs whatsoever of his body, the eldest heir female succeeding without division, whom failing to *B.* and the heirs male, &c. of his body, and so on according to the will of the donor.

In the case of a simple destination, the substitute heirs have merely *a spes successionis*. It is in the power of any heir who gets into possession to dispose of the property either for onerous or gratuitous causes, and to alter the order of succession; and every heir in succession represents his predecessor, and becomes liable for his debts. If any heir in possession does not alter the order of succession, the property goes to the next substitute, and so on; so that a property devised to a series of heirs may descend through many generations, and continue in the line of succession pointed out by the donor, until altered or disposed of, or attached by the creditors of some one or other of the heirs who came into possession in the course of succession.

Dispositions with prohibitory Clauses only.

2d.—The second species of Entail is a disposition containing prohibitory clauses, but without irritant or resolutive clauses. The principal prohibitory clauses are those prohibiting the disponees or institutes and heirs of Entail from altering the order of succession, from alienating or contracting debt, or doing any other deed whereby the right of succession of the substitute heirs may be frustrated or defeated. There are various other prohibitions inserted in Entails, for the purpose or with the view of preventing the right of the substitute heirs from being impaired; such as not letting the lands below the former rental, and those prohibitions are sometimes coupled with pernicious conditions, such as not letting grassums or fines below the rental, *except by publick roup, &c.*

Entails which contain prohibitory clauses merely, are not good against creditors or disponees for onerous causes, that is, the creditors of any heir in possession may attach the property or it may be sold, and the sales will be effectual to the purchasers. But I understand the law laid down by institutional writers to be, that under a prohibitory clause gratuitous alienations may be set aside, and if any possessor under an Entail, containing a prohibition against alienating and contracting debt, although it is not fenced by irritant and resolutive clauses, should sell the property, or if it should be adjudged by his creditors, the substitute heirs of Entail have a claim of damages against the heir so contravening, and for compelling him

him to reinvest the price upon the purchase of an estate, and settle it upon the same series of heirs as those contained in the original imperfect Entail.* I understand, however, that this doctrine hae lately been questioned, and that there is a case now in dependence before the House of Peers, in which it is contended that an heir of Entail, under an imperfect deed, which is deficient in the irritant and resolutive clauses, though it contains prohibitory clauses against alienating, is not liable in damages for the contravention, nor to reinvests.†

Taillies containing prohibitory, irritant and resolutive Clauses.

3d.—I come now to the *last* and higher order of taillies, namely, those containing clauses *irritant and resolutive*, as well as prohibitory. The *irritant* clause declares, any deed done in contravention of the prohibitions contained in the Entail, to be void and null; and the *resolutive* clause forfeits the contraveners' right, and declares the next heir of Entail entitled to take up the succession; and here I shall take the liberty of stating, that the account of this species of Entails, which I shall have the honour of stating to the Committee, is chiefly made from the notes which I took down from the lectures of the distinguished individual who filled the chair of the professorship of Scots law in the year 1794.

The first inquiry in regard to the law of Entails, is what was the state of the law previous to the enactment of the statute 1685, which modified the system of Entail law then existing?

Upon this point the learned professor, as I have it in my notes, said, "There never could "be any doubt that irritant and resolutive clauses were binding on the heir who accepted "the estate under the conditions imposed by the taillier, and that the person who con- "travened became liable in damages to the next heir of Entail; but whether those clauses "could affect the heir's onerous creditors, and purchasers *bona fide* contracting, was quite a "different question, and produced much controversy among lawyers. I have already given "my own opinion, that there is no inconsistency in attributing this power even to a common "prohibitory clause; but holding the contrary to be the case, and Lord Kames's opinion to "be good, it applies equally to irritant and resolutive clauses as to a simple prohibitory clause. "The general opinion of lawyers in the last (sixteenth) century, was accordingly against "these clauses, and particularly Lord Stair. The disposition, however, of the great families "of the country was naturally on the other side, and in particular it was argued in support of "such clauses, that a settlement containing them was at least an interdiction in its own terms. "The first case in which this question was brought to trial, was the creditors of Lord Annan- "dale against Lord Stormont, 20th February 1662, where the irritant and resolutive clauses "were found effectual against singular successors, it being considered as so published, by "being engrossed in the instrument of seasine as to serve the purpose of an interdiction. "But this judgment was very far from giving universal satisfaction, or being considered at "the bar as a well-founded decision: It was thought a precedent full of inconvenience and "hazard, as well to the heritors themselves as to creditors; and that there ought to be some "difference between a judicial prohibition and a prohibition contained in a private settlement "by Entail. In the year 1685, therefore, in the double view of gratifying the desires of the "great landholders, and rendering the law agreeable to the commercial interests, a statute "was framed (1685, cap. 22) declaring irritant and resolutive clauses effectual against cre- "ditors and singular successors under certain conditions and regulations."

As the compliance with the conditions and regulations of the statute is what now constitutes a *strict* Entail, that is, an Entail effectual not only against the heirs themselves, but against their creditors and singular successors, I shall state shortly what I consider the requisites of the statute, in so far as may be necessary to convey to the Honourable Committee the idea of a *perfect or strict* Entail by the law of Scotland. All others which are in any way deficient in any of the requisites of the statute, may properly be denominated *imperfect* or *defective* Taillies.

1st.—In order to be effectual against creditors and singular successors, the Taillie must contain both *irritant* and *resolutive* clauses as well as prohibitory. The Statute begins by declaring it "to be lawful to all His Majesty's subjects to taillie their lands "and estates, and to substitute heirs in their taillies, with such conditions and pro- "visions as they shall think fit, and to affect their said taillies with *irritant and resolutive* "*clauses*, whereby it shall not be lawful to the heir of taillie to sell the said lands or contract "debt, whereby the same may be evicted, declaring all such deeds to be in themselves void, "and with power to the next heir of taillie to pursue declarators thereof, and serve himself "heir to him who died last infeft in the fee, and did not contravene without any way "representing the contravener." Here you have a description of the clauses which must concur and be inserted in the taillie to make it effectual against creditors and purchasers. A settlement, then, which bears only prohibitory clauses, can have no other effect than to prevent gratuitous alienations; and even though aided with irritant clauses without the *resolutive*, the prohibitory clauses would not strike against third parties. This point was tried and decided in the case, Creditors of Humbie, 8th February 1758. In like manner it was found that resolutive clauses without the irritant, were equally ineffectual against creditors.—Baillie *against* Carmichael, July 1734: Kilkerran, N° 4, p. 540. Kemp *against* Watt, 28th July 1779.

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* See Erskine, book 3d. tit. 8. § 23. And this view of the law has been supported by various decisions; Lord Strathaven *against* Duke of Douglas, 2d Feb. 1728, Mor. 15373. Gordon Cumming *against* Gordon, 29 July 1761, (15513.) Sutherland *against* Sinclair & Baillie, 26 Feb. 1801. Lockhart *against* Stewart Denham, 11 June 1811.

† Lockharts *against* Stewart Denham, remitted from House of Peers. Stewart *against* heirs of Entail of Agnew.

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The statute next proceeds to make provision, that the public and all concerned be certiorated and informed of a matter of such importance; and therefore declares:—

1.—That the taillie shall only be effectual where the clauses, irritant and resolutive, are engrossed in the procuratories of resignation charters, precepts, and instruments of seasine, which proceed on the Entail; and therefore unless the prohibitions be inserted in all the titles to the estate, the omission will defeat the whole train of deeds however complete otherwise; a reference from one deed to another will not do.—Clerk Homes decisions, N° 269, Bromfield *against* Paterson, 29th June 1784.

2.—The statute requires the insertion of the Taillie in a separate record instituted for the purpose. It enjoins that the Taillie be judicially produced to the Lords of Session, who shall interpose their authority thereto, and that a record shall be kept, wherein shall be inserted the names of the makers of the Taillie and the heirs of Taillie, and the provisions and conditions therein contained with the irritant and resolutive clauses thereto subjoined, to remain in the said register *ad perpetuam rei memoriam*. Registration, then, is another essential of a good taillie, which cannot be supplied by other circumstances.—See the case of Bromfield above referred to, where there were two deeds of Entail, one somewhat different from the other. The court found the non-registration of the second deed was a defect that laid the estates open to the diligence of creditors, though the heir of entail was in possession.

An Entail may be put on record, either upon the application of the maker, or of the heir in possession, or of any substitute however remote.

3.—The statute requires that all the provisions, irritances, &c. shall be repeated in all the subsequent rights and conveyances, whereby the heirs of Tailzie shall brook or enjoy the taillied estate; and here no reference to the former titles will be sufficient. And the provision applies equally to Entails executed before as after the statute 1685. If the limitations of the Entail, therefore, are not inserted in the titles of any heir, they will not be effectual against third parties contracting with the heir in whose titles they are omitted. It might here be supposed, that this provision, though highly expedient for the security of third parties, opens a door to any heir of Entail, to free himself from all the limitations (or fetters as they are called) of the Entail, by omitting to insert them in his investiture. But this the legislature had foreseen, and accordingly the statute provides, that if the said provisions and irritant clauses shall not be repeated in the rights and conveyances whereby any of the heirs of taillie shall brook or enjoy the estate, the said omission shall import a contravention of the irritant and resolutive clauses against the person and his heirs who shall omit to insert the same, but shall not militate against creditors and singular successors who shall have contracted *bonâ fide* with the person who stood infeft in the said estate without the said irritant and resolutive clauses in the body of his right. Thus although the transactions of an heir omitting to insert the limitations, may be effectual to onerous purchasers, the heir contravening forfeits his right to the estate, and any of the substitutes may bring an action of declarator of contravention which will protect them any time before a sale has taken place, but not after it, except the sale be partial, in which case the declarator will secure all lands not then sold. The penalty of forfeiture is such as in general to enforce the observance of the statute; and I am not aware of any case where the penalty of forfeiture has been incurred by the omission of the limitations in the investiture of an heir.

These are the several conditions required by the statute towards the making of a strict Entail, which when regularly completed in all those particulars, the statute "declares to be "real and effectual not only against the contraveners and their heirs, but also against their "creditors, comprisers, adjudgers, and other singular successors whatsoever, whether by "legal or conventional titles." The expression singular successors, means purchasers or disponees, either onerous or gratuitous.

I have thus endeavoured to show, to the best of my ability, such a general view of the law as may enable such of the honourable Committee, as are not acquainted with the subject, to form some notion of the nature and principles of Scotch Entails. To enter upon the various questions which have arisen, or may arise out of the law of Entail, would lead into a field of discussion far beyond what any humble efforts of mine could accomplish within any reasonable time. What I have stated may perhaps be of some use to the honourable Committee in legislating upon a matter of great importance and considerable intricacy; and I shall conclude these observations, by stating a general remark, concerning the scope and purpose of the Act 1685. This remark, which is drawn from the source to which I have formerly alluded, is as follows: "We are not to look upon that Act as an absolute regulation of law respecting "Taillies and their effects, and as superseding all questions at common law. On the con-"trary, it only ascertains the interest of third parties, without infringing at all on the "common law before the time of the statute regarding the interest of the heirs among them-"selves." If this remark be correct, in making an alteration upon the law of Entail, it becomes necessary to attend not merely to the provisions of the Act 1685, but to the rules of succession by the common law.

HAVE you also prepared any statement with which you could furnish the Committee, respecting the operation of the Statutes of the 10th George third, chapter 51, and 5th George fourth, chapter 87?—I have prepared and hold in my hand a paper, which contains an abstract of those Acts, and a State shewing the effect of the operation

operation of them on the interest of the subsequent heirs of Entail, which, if permitted, I will deliver in.

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[The Witness delivered in the same, which was read as follows:]

ABSTRACT of the Act 10 Geo. III. c. 51, and of the Act 5 Geo. IV. c. 87, and STATE, shewing the effect of the exercise of the powers conferred on heirs of Entail in possession, by these Acts, on the interest of the subsequent heirs succeeding to the estate.

I.—ABSTRACT of the Act 10 Geo. III. c. 51.

THIS Act which was made for encouraging the improvement of Lands in Scotland, contains *inter alia*, the following provisions:

1st.—With regard to Improvements on the Estate.

"THAT every proprietor of an entailed estate who lays out money in inclosing, planting or "draining, or in erecting farm-houses and offices or outbuildings for the same, for the im- "provement of his lands and heritages, shall be a creditor to the succeeding heirs of Entail, "for *three fourth parts* of the money laid out on making said improvements: Provided "always, That the sum or sums of money laid out in such improvements by any one heir of "Entail during his or her possession, shall not in any case whatever be effectual to con- "stitute a claim against the succeeding heir of Entail, for more than *four years* free rent of "the said entailed estate, after deduction of all publick burdens, *life-rents* and interests "of debts, which may affect the said estate, as the same shall happen to be at the first term "of Whitsunday, after the death of the heir who expended the money claimed."

This Act contains various provisions relative to the mode of constituting the claim against the succeeding heirs, without which the claim will not be effectual. And it provides, "That "when a sum equal to four years free rent, shall have been laid out in manner above men- "tioned, by one or more heirs of Entail, and *shall remain a subsisting charge against the* "*succeeding heirs*; it shall not be lawful for any subsequent heir or heirs to lay out any more "money under the authority of this Act, for any of the improvements afore mentioned."

After stating the mode in which the claim may be made effectual against the succeeding heir, the Act provides, "That when any heir in possession is sued for the money due on "account of improvements made upon an entailed estate, under the authority of this Act, "he shall be discharged in all cases from such suit, upon his assigning and effectually con- "veying to the creditor or creditors *one-third* part of the clear rents of the entailed estate "during his life, or until the money so due shall thereby be paid off and discharged."

The Act then contains sundry provisions for recovery of the money in the event of the first or any subsequent heir dying before it is paid off; the result of which is, that no heir in possession for the time, and his personal representatives, can be subjected in payment of more than one-third part of the free rents of the estate during the period of his possession, and that no adjudication can be obtained against the fee of the estate for any such claims.

2d.—With regard to Building or Repairs of a Mansion-house and Offices.

IT is provided, "That every heir of Entail who lays out money in building a mansion- "house or offices, or in repairing or adding to the mansion-house or offices upon his estate, "shall be a creditor to the next succeeding heir of Entail, for *three fourth-parts* of the money "expended by him."

Provided that the sum or sums of money so laid out by any one heir of Entail, shall not in any case whatever be effectual to constitute a claim against the succeeding heir of Entail for more than *two years free rent* of the estate, after deduction of all publick burthens, *life rents*, and *interest of debts*, which may affect the estate at the first term of Whitsunday after the death of the heir who expended the money claimed.

And it is Enacted, "That the same rules of relief among succeeding heirs of Entail, and "their heirs and executors, shall take place in regard to monies expended in building and "repairing mansion-houses or offices, as are enacted with respect to monies expended for "improvements."

II.—ABSTRACT of the Act 5 Geo. IV. c. 87.

THIS Act proceeds on the recital, That sundry Entails of lands and estates in Scotland, contain no powers in regard to the granting of provisions to the wives or husbands and children of the proprietors thereof; and in many other Entails by reason of the change in the value of money, the improved value of lands and other causes, the powers of granting provisions to the wives or husbands or children of the proprietors of such entailed estates, have become entirely inadequate for those purposes, and it has become expedient that the powers of granting such provisions should be conferred or enlarged, under certain regulations; It is therefore, *inter alia*, Enacted;

1st.—That it shall be lawful to every heir of Entail in possession of an entailed estate in Scotland, to provide and infeft his wife, in case she shall survive him, in a life-rent provision by way of *annuity*: Provided always, "That such annuity shall not exceed *one-third part* "of the free yearly rent or free yearly value of the whole of the said lands and estates, after "deducting the publick burdens, the former or other life-rent provisions, the yearly interest "of debts and provisions, and the yearly amount of *other burthens* of what nature soever,

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" affecting and burdening the said lands and estates, and *diminishing the clear yearly rent* " *or value thereof to such heir of Entail in possession.*"

2d.—That it shall be lawful to any heir female in possession of such entailed estate, to provide and secure her husband in a life-rent provision out of her entailed lands and estate by way of annuity: provided always, that such annuity at the death of the grantor shall not exceed *one-half* of the free yearly rent or free yearly value of the whole of the said lands, after all deductions to be made from the same as aforesaid.

3d.—That not more than two life-rent provisions shall subsist at the same time.

4th.—That the terce or courtesy shall be excluded.

5th.—That it shall be lawful to the heir of Entail, in possession of an entailed estate, to grant bonds of provision, binding the succeeding heirs of Entail in payment out of the rents or proceeds of the same, to the lawful child or lawful children of the person granting such bonds and obligations, who shall not succeed to such entailed estate, of such sum or sums of money bearing interest from the grantors' death, as to him or her shall seem fit: provided always, that the amount of such provision shall in no case exceed the proportions following, of the free yearly rents or free yearly value of the whole of the said entailed lands and estates, after deducting the public burdens, life-rent provisions, the yearly interest of debts and provisions, and the yearly amount of other burdens of what nature soever, affecting or burdening the said lands and estates, and diminishing the clear yearly rent or yearly value to the heir of Entail in possession; that is to say, for one child, *one* year's free-rent or value; for two children, *two* years' free rent or value; and for three or more children, *three* years' free-rent or value in the whole.

6th.—That no securities granted for life-rent annuities and provisions, shall affect the fee of the estate.

7th.—Lastly, it is enacted " That the powers given and granted by this Act, and by the " said recited Act of the tenth year of the reign of his late Majesty, shall in no case be " exercised to such an extent, as to deprive the heir in possession of any entailed lands " and estates in Scotland of more than *two-third parts* of the clear annual income of the " estate."

III.—STATE shewing the effect that the exercise of the powers conferred by the two before-mentioned Acts may have upon the Interest of the succeeding Heir.

Supposing the proprietor of an entailed estate was inclined to burden the succeeding heirs to the full extent of the powers conferred by the two Acts, it would be extremely difficult to define the precise limits of the powers created under each of the Acts severally. For it will be observed, that by the *first* Act the powers conferred are limited to *four years'* free-rent of the estate, *after deduction* of all public burdens, *life-rents*, and interest of debts, which may affect the estate at the first term of Whitsunday after the death of the heir who expended the money for improvements; and to *two* years free-rent, after a similar deduction for money expended on the mansion-house; and there is a second limitation to *one-third* of the clear rents of the estate during the possession of each heir. And by the *second* Act the power of granting annuities to widows and husbands, and provisions to children is limited, according to the free rental, *after deducting* public burdens, former and other life-rent provisions, interest of debts and provisions, and the yearly amount of *other burdens of what nature soever*, affecting and burdening the said lands and estate, *and diminishing the clear yearly rent and value thereof*, to the heir in possession. This last deduction I apprehend includes the third of the free-rents, which under the former Act may be set aside for extinguishing the claim for improvements. And if so, it is obvious, that before ascertaining the extent of the power conferred by the *first* Act, you must ascertain the amount of *the life-rent provisions* granted by the second, which form a deduction in ascertaining the free rental by which the powers of burdening under that Act is regulated. And on the other hand, before you can ascertain the extent of the *life-rent annuities* and provisions to children, which may be granted under the *second* Act, you must ascertain the powers of burdening under the first, by which " the " clear yearly rent to the heir in possession *is diminished.*" The provisions of the two Acts seem to run in a circle; and it appears to me, that the problem for ascertaining the *maximum* power of burdening the succeeding heir under each Act, as distinguished from the other, supposing the powers to be exercised *pari passu*, can only be solved by an equation. If the powers of burdening should not be exercised or ranked on the rents *pari passu*, or if an heir in possession should exceed the powers conferred by either or both of the Acts, I have not been able to discover any rule under the provisions of the Acts, or at common law, by which the interests of the conflicting parties, viz. the widow, and children, and creditors for improvements, could be settled. There is only one element fixed, and that is, that however the fund provided for these parties may be divided, the heir in possession cannot be deprived of more than *two-third parts* of the clear annual income of the estate during his possession; that is, as I conceive, two-thirds of the rental, after deducting the public burdens and interest of the entailer's debts, if such there be.

In these circumstances, without endeavouring to shew what would be the result if the powers under the two Acts were exercised to their full extent, I shall state a case in which the data assumed are evidently within the limits of the Acts; and shall shew the probable result

result as affecting the interest of the heir who may succeed after the person exercising the powers.

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* Suppose an entailed Estate yielding 6,000*l.* per annum, after deducting public burdens and interest of entailer's debts.

An heir of Entail in possession lays out 32,000*l.* on improvements (whereof 21,333⅓*l.* on the estate and 10,666⅔*l.* on a mansion-house,) and declares three-fourths thereof, or 24,000*l.*, a burden on the next heir, and he grants a jointure of 1,400*l.* to his widow, and provisions, amounting to 8,000*l.*, to his younger children.

In this case the burdens laid upon the next heir will be as follows:—

For improvements	£. 24,000
For provisions to younger Children	8,000
Amount of Capital	£. 32,000

Besides an annuity of 1,400*l.* to the widow, and these burdens must be paid out of the rents.

The heir burdened is entitled to retain *one-third* of the free rents, or 2,000*l.* to himself, and to appropriate the remaining *two-thirds*, or 4,000*l.* to the extinction of the burdens.

Supposing the widow to live, the operation of this sinking fund (as it may be called) will be as follows:—

Annual Instalment from rents	£. 4,000
Deduct Jointure to Widow	1,400
Remains	£. 2,600

to be applied to the extinction of a capital of 32,000*l.* bearing interest at 5*l.* per cent.

And supposing nothing allowed for charges of management, repairs, or defalcations of tenants, the capital of 32,000*l.* would only be paid off in *twenty* years.

If the widow were to die immediately after her husband, there would then be an annual fund of 4,000*l.* to be applied, which would require *eleven* years to pay off the capital.

Supposing the heir of Entail to succeed to the estate at the age of thirty-three, his expectation would be twenty-seven years; so that according to the probabilities of human life, he would in the case supposed, be kept out of possession of two-thirds of the rents of the estate for a great proportion of the time of his possession.

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* *Note*:—TO shew that the data assumed are within the limits of the two Acts.

1.—To find the limits of the powers of charging for improvements:—

Net rental, after deducting public burdens		£. 6,000
Deduct annuity to widow	£. 1,400	
Interest of 8,000*l.* provisions to children	400	
		1,800
Free rental		£. 4,200
Whereof four years for improvement of estate		£. 16,800
And two years for building and repairs of mansion-house		8,400
Sum that might be charged		£. 25,200
but only charged	£. 24,000.	

2.—To find the limits of the powers of charging for annuity to widow:

Net rental as before		£. 6,000
Deduct one-third of the free rents chargeable under the Act 10th Geo. 3, viz. one-third of 4,200*l.*	£. 1,400	
Interest of provisions	400	
		1,800
Remains		£. 4,200
whereof one-third is	£. 1,400	

equal to the sum assumed as the widow's annuity.

3.—To find limits for charging for provisions to children:—

Net rental as before		£. 6,000
Deduct one-third from rents chargeable for improvements	£. 1,400	
Widow's annuity	1,400	
		2,800
Remains		£. 3,200

and three years rent is £. 9,600, but there is only charged £. 8,000.

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In the meantime, although he would be in the nominal possession of an estate of 6,000 *l.* per annum, he would only enjoy - - - - - - - - £.2,000

And out of this sum he would probably have to pay as follows:

Expenses of management, including factor fee, ground officer's salaries, &c. on an estate of 6,000 *l.* per annum -	£.300	
Repairs of farm-houses, mansion-house, &c. probably	300	
Loss by defalcation of tenants, law charges, and other contingencies, probably not less than - - -	300	
Assessed taxes for mansion-house, &c. say - -	100	
		1,000
Leaving only - - - - - -		£.1,000

to support the rank attached to an estate of £.6,000 per annum.

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CAN you furnish the Committee with any general statement of what you consider the effects of the law of Entail in general, or the evils arising from that law?—Since I came here, as well as before, I have directed my attention to that subject and I have made up a short Statement of what I conceive to be the results of the law of Entail, which with the permission of the Committee, I will deliver in.

[*The Witness delivered in the same, which was read as follows:*]

STATEMENT of the Evils resulting from the System of ENTAILS in *Scotland.*

1.—LAND entailed is put *extra commercium*; and as there is no limitation to the power of making Entails, either in regard to the magnitude or number of the estates that may be subjected to their operation, it is obvious that if a stop be not put to entailing a great proportion of the land in Scotland may be entailed, whereby the rest of the community may be deprived of the power of acquiring right to any part of the soil;—a state of internal policy which appears to be inconsistent with the constitution of a free country.

2.—Entails obstruct the improvement of the country in Agriculture and other branches of industry.

1. By the restraints frequently imposed on the administration of entailed property, such as the prohibition to let lands under the former rent, except by public roup.

2. By heirs of Entail being limited to the possession during their lives, and having no adequate means of raising money by charging the entailed estate for the purpose of improvements, by draining, building farm-houses, planting and inclosing. The provisions of the Act 10th George 3rd, are quite ineffectual for this purpose; 1st, because the exercise of the power is trammelled by so many conditions, the least deviation from which renders it nugatory; 2d, because the money must be expended before the security can be created, and no person of prudence will lend upon an uncertainty. It is only in cases where heirs of Entail have other resources than the entailed estate, that improvements can be made. This may be the case with the first or second heirs under an Entail, but after one or two generations the resources will fail, and it will require the whole rents to provide a bare subsistence. The deterioration of the country, therefore is not so apparent now as it will be. It must be evident to any person who reflects for a moment on this subject, that this evil has a tendency to increase in the compound ratio of the number of Entails which are coming into existence, and the length of their endurance.

3. I can say from my own knowledge, that there are extensive districts of country in the islands of Scotland under Entail. In some of these islands there are advantageous situations for the fishery of cod and ling; and I have every reason to believe, that were part of the property disentailed, it would produce most beneficial effects, not merely to the entailed proprietors themselves, but to a numerous class of industrious people, who live on their estates, by enabling the proprietors to advance the necessary capital for purchasing boats and fishing materials, and making and improving harbours at the fishing stations, and directing their labour to other industrious pursuits. Some relief to the proprietors and population of these districts has become absolutely and imperiously necessary, from the circumstance of the great depression in the price of kelp, which has hitherto formed a most important source of revenue to the former and employment to the latter. I have the best authority for stating, that the almost total annihilation of the kelp trade, which is expected to take place, from the lowering the duties on barilla, and the removal

removal of the duties on salt, (from which articles substitutes for kelp are made at a rate with which it cannot compete) threatens to produce the most direful consequences to the inhabitants of the kelp district. I attended a meeting of the kelp proprietors lately in Edinburgh, and I am afraid I would be supposed to exaggerate were I to state to the honourable Committee the immense number of people, who, according to the information obtained at that meeting, it was calculated would be thrown out of employment, and reduced to a state of complete destitution by the change that had taken place in the kelp trade, from the circumstances to which I have alluded. It may be sufficient for me to say, that I have been informed since I came to London, that the application of the kelp proprietors to His Majesty's Government for relief, by sanctioning an application to Parliament for imposing protecting duties on the articles coming into competition with kelp, has not yet met with the success that was expected. If I may be permitted, therefore, to offer my advice, I would humbly suggest to the honourable Committee to enquire into the condition of the poor kelp manufacturers, many of whom are now on the point of emigrating to America. I will not say that the measure under the consideration of the Committee, will be a sufficient remedy for the evils with which the people of the Hebrides and northern islands of Scotland are threatened, nor that it is all that their case requires at the hands *of the public*, of which they form an important integral part; but I am humbly but confidently of opinion, that were the hands of the proprietors of the Entailed estates in these districts loosed from the fetters with which they are bound, by the Entails under which they are held, these proprietors might in some measure, be enabled by the command of capital that would be thus afforded, to arrest the progress of emigration that is now going on, and by encouraging the industry of the population on their estates, and directing it to the fisheries and other objects, new sources of wealth would be opened up, not only to the proprietors themselves but to the country at large; and it might to a certain degree, be the means of preserving to the state a loyal, industrious and hardy race of people, whose services, should the country again be involved in war, might be of the highest importance.

3.—Heirs of Entail although they cannot sell any portion of the estate to relieve themselves from the pressure of any debts or obligations they may have incurred, may sell their life interest or they may burden it with annuities. By this means they are sometimes completely divested of all interest in the estate. In other cases their estates are placed under the management of trustees for behoof of their creditors, either by the voluntary act of the proprietors themselves, or by the judicial appointment of the court of Session at the instance of the creditors. I know instances of both these species of trusts; I know of one case, where the proprietor of an entailed estate of upwards of 1500*l.* a year was lately liberated from gaol on a *cessio bonorum*. In many cases the entailed proprietors although not under trust, are labouring under great pecuniary difficulties. Their debts are sometimes incurred from extravagance; in many cases from expenditure upon their estates, or in building or repairing a mansion-house and embellishing the grounds. This expenditure is sometimes beneficial to the estate; in other cases it produces no addition to the revenue; in few cases I believe is the money expended, made a charge against the next heir under the Act of the 10 Geo. 3. The proprietor who makes the improvements has frequently money in his hands from other sources or from credit. It is expended, and he does not think of taking any measures for constituting the charge. It is only when the entailed proprietor begins to feel the pressure of debt, that he thinks of availing himself of the privileges of the statute, and then perhaps from the neglect of agents or other causes, the want of some of the necessary formalities required by the statute, renders the security of no avail; if the security does take effect, it is only removing one evil by creating another, of perhaps a more intolerable nature on the heir succeeding to the estate.

4.—By the joint operations of the Act 10 Geo. 3. to which I have alluded, and of the Act 5 Geo. IV. authorizing any heir to charge the succeeding heir with family provisions, the interest of heirs of Entail may be reduced to one-third of the free rents of the estate after deducting public burdens; and when from this third is deducted the expenses of management, necessary repairs, loss by tenants, expense of sequestrations and litigation applicable to the *whole estate*, it must be evident that in many cases where the privilege is exercised to the full extent, the interest of the heir in possession may be reduced to a mere shadow.

5.—From the circumstances referred to in the two last articles, the pressure of debts of their own contraction, and debts imposed by their predecessors, it is evident that in many cases heirs of Entail must become dependent on their creditors. In these circumstances I am humbly of opinion, that if Entails were intended to uphold the dignity and respectability of families, they are ineffectual for that object under the present system. It must also be evident, that as a great number of Entails have been recently made, the evils which I have pointed out have not yet come into full

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operation; and that they must constantly increase in proportion to the number of Entails that come into existence, and the length of their duration.

6.—Persons involved in debt often make Entails; and unless the estate be utterly bankrupt, there is no remedy in this case except by applying to Parliament for authority to sell. The creditors thus, from no fault of their own, but from the absurdity of the maker of the Entail, and the absurdity of the law which does not provide a remedy, are delayed in the payment of their just debts, and the heirs of Entail subjected to great expense.

7.—The expectations of substitute heirs of Entail, sometimes remote in degree, induce them not to exert their industrial talents, and those expectations often end in disappointment. The state is thus deprived, by the influence of the system, of the services of individuals, who might in other circmmstances have been useful members of society.

8.—Estates being often settled on males by Entail, (executed at a distant period) frequently pass from one heir (leaving a family of daughters very slenderly provided for,) to some distant relation.

9.—Heirs of Entail have no power to regulate the succession to their estates. They have, under the sanction of the Entail law, been deprived by some distant ancestor, perhaps, of that power which every absolute proprietor of an estate has, and which, in my humble opinion, every proprietor ought to have, the power of naming their immediate successor, and of imposing such restraints as may be proper in the circumstances of the case. However extravagant or prodigal the immediate successor may be, the heir of Entail in possession has no power to set him aside, or lay him under any restraints in the use of the property. Nay there is a case reported, where it was found that although the next heir was an idiot, the heir in possession could not alter the succession. Halket *against* Wedderburn, 1762. Mor. p. 15416.

10.—Great Evils arise from the Uncertainty of the law of Entail.

I shall only mention one case which has created much discussion, that of Stewart *against* Vans Agnew, of Sheuchan. For the particulars and the result of this case, I beg leave to refer to the very excellent Treatise on the law of Entail by Mr. Sandford, p. 118. The question which came to be decided, was Whether or not an Entail can be made so as to be effectual against the creditors of the entailer? The court of Session, by an unanimous decision, pronounced on 3d March 1784, found that the Entail was altogether ineffectual in a question with the creditors of the entailer. This decision was held by all the legal authorities in Scotland, as settling the law. Having however been prevented from becoming final, by the intervening minority of a substitute heir of Entail, the decision was brought under review of the House of Lords; and on hearing the appeal, the House (24th July 1814) remitted the cause to the court of Session for reconsideration. In consequence of this remit, the question was fully argued upon informations, and on the 2d of June 1818, the court unanimously adhered to the decree of 1784. The case was again appealed to the House of Lords, who reversed the decisions of the court of Session. By this decision of the court, what was understood to be the law in 1784 was found not to be law in 1822.

That the decision of the court in 1784, was laid down by high authority as fixing the point, that an Entail cannot be made in any circumstances so as to affect the creditors of the entailer;—I have it in my power to shew, by reference to the notes which I took of the lectures of the Professor of Scots law, when I attended his class in the year 1794; and with permission of the Committee I will read from the extended notes what I then took down. The notes are as follows: "As to the entailers power of alienating or incumbering which concerns "*third parties*, it has been lately decided first in a question with creditors, and "secondly in a question with purchasers, that these powers cannot be barred by "the Entail, 3d March 1784, Stewart *against* Agnew—10th March 1786, "Dickson *against* Dickson. There can be no question if we look to the statute "1685, we shall find no effect given to any restraints except those laid on the "*heirs of Entail*; and as it would seem the statute is a complete settlement of the "law of Entail *in as far as respect third parties* concerned, so whatever restraint "cannot be brought under it, is prohibited and disallowed. It is therefore "needless to enquire, how this would have stood had this statute not been "enacted. The *onerous* debts and deeds then of the person who makes the "Entail, must *in all events* be good against the estate, even though contracted "after infeftment. And if the estate be bankrupt, it is in the power of the "creditors to bring it to a judicial sale in spite of the taillie."

Here then it will be observed, that a decision quoted by the professor of Scots law, as fixing a point of law in the year 1794, and it is to be presumed acted upon by all creditors and other third parties, contracting with persons in a similar situation, from the time of the solemn unanimous decision of the court ten years before, was reversed, at the distance of near 40 years from the time of the decision, and all those contracts liable to be set aside.

11.—Another

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11.—Another evil of the Entail system is the excessive and expensive Litigation to which it gives rise.

Many of the questions arising out of the system of Entails may be considered as set at rest by decisions of the courts of law; although from the impression made on the minds of lawyers and practitioners by the reversal of the decision to which I have alluded, doubts have been thrown upon the system of Entail law in general, which have a tendency to unhinge points which were formerly considered as settled, and to render transactions with the proprietors of entailed estates, in the opinion of the public, more insecure than formerly; and to create alarm as to transactions which have already taken place with such proprietors.

However that may be, there is, in my humble opinion, one source of litigation which never can be removed while the present system of Entail law continues; and that is the rule of *strict interpretation*. In order to mitigate the rigour of the law of Entail, Judges have adopted this rule, and the ingenuity of lawyers has been set to work to find different readings for expressions in settlements of Entail, which never entered into the head of the maker of them; and cases have occurred where the Judges have acknowledged that according to their own conviction these decisions were in direct opposition to the will of the entailer.

As there is no precise figure of words according to which Entails must be made, it is obvious that the variety of expressions that have been and may be used by the framers of these deeds, must form a wide field for the criticisms of lawyers, and a fruitful source of litigation.

One of the chief points upon which litigation arises is, whether the fetters of the Entail be properly directed against the institute; and if they are not so directed in all the clauses prohibitory, irritant and resolutive, they are ineffectual; an omission in any one of those clauses will lay the estate open to creditors and singular successors; and the interests of large bodies of creditors, in opposition to that of the heir of Entail, often depends upon the interpretation of a single word. It often happens, that although the institute is named in the prohibitory clause, he is only designated or intended to be so by reference in the irritant or resolutive clauses. Thus, in one case, it was found that the institute was comprehended under the expression "Members of Tailzie." In another it was found, that he was properly designated under the expression, "person or persons heirs of tailzie foresaid." Here, in order to bring the institute under the fetters, it was necessary to divide the clause into two parts, and to read it thus: "person foresaid, or persons heirs of tailzie foresaid." By connecting the word "person" with the word "foresaid," the word person was (by a forced construction, in my humble opinion) made to apply to the institute, who was named in a former part of the deed. If the words "person or persons" had been connected with the terms "Heirs of Tailzie," then the fetters would not have been directed against the institute, and he would have been free. In a third case in which I was concerned for the interest of the creditors, the lynx eye of a practitioner of the law in Glasgow thought he had discovered a flaw in an Entail which had escaped my notice, although I had, at the particular request of the creditors, examined the Entail to see if it was in any way vulnerable. In this case the prohibitions were directed against the institute by name; the irritant clause was also properly directed; but in the resolutive clause the institute was not named, but intended (as was admitted on all hands) to be comprehended under the expression "each and every heir or person so contravening." Here it was contended on the part of the creditors, that the expressions "heir" and "person" were to be taken as synonymous terms; that the word person was to be considered as redundant or *pro non scripta*; and consequently, that the resolutive clause applied only to the heirs of taillie, and that the estate was subject to the debts of the institute. The interest at stake being of great magnitude, the creditors were advised by the first counsel at the Scottish bar, to try the question. The result was an unanimous decision of the court of Session against the interpretation maintained for the creditors, which was affirmed on appeal to the House of Lords, and an expense of 2,000*l.* was incurred by the creditors in trying the question, in addition to their other losses. They have received two dividends, one of 1*s.* 6*d.* and another of 10*d.* per pound on the debts due by the institute; and it is very doubtful if the unentailed funds will yield 1*s.* per pound more.

Steele. Reinaldson Dickson. Glassford.

Such are the "nice, thin and shadowy distinctions," as they were properly designated by the distinguished person who at that time presided in the court of last resort, in giving judgment upon the case of Steele, before referred to, upon which the interest of parties who contract with heirs of Entail depend. And I can see no manner of preventing the recurrence of such questions, except by the repeal of the law or by laying down a precise form of words, by which and by no other, an Entail can be made.

12.—By the Act 1685, it is enacted, That it shall and may be lawful to His Majesty's subjects, "to substitute heirs in their tailzies *with such provisions and conditions as "they shall think fit.*"

The vague and indefinite nature of this provision, has given rise to some absurd and pernicious restraints on the proprietors of entailed estates. Such

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not being entitled to let lands below the former rental, except by public roup; not to take grassums, &c. And I am even informed, that one Entail contains an obligation on the proprietor, to reside for a certain time every year upon the estate, and to have always in his own hands a certain quantity of land.

There is no saying to what an extent the caprice of individuals may carry restrictions upon their successors, under such a clause.

Lastly. Heirs of Entail contract debts, and mercantile people seeing them possessed of large estates give them credit; but the fee of the estate not being liable for the debts of the heirs of Entail, the people who have so given credit or lent their money, frequently suffer loss, while the estate descends to the next successor who does not represent his predecessor.

Archibald Bell, Esquire, called in; and Examined.

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YOU are sheriff-depute of the county of Ayr?—I have been so for above thirteen years.

Has your practice at the Scotch bar, and your experience generally in the law of Scotland, given you occasion to study, and to have a knowledge of the law of Entail in that country?—To a certain extent. My practice was never very extensive, but it has led me to consider that point amongst others.

Do you consider that the law of Entail, as founded on the Act of 1685, and as modified by subsequent statutes, is founded in expediency?—My own private impression unquestionably is rather the reverse. It seems to me, to a certain degree, to prevent the improvement of land, and in many instances to be inconsistent with the rights and interests of creditors; and chiefly I should conceive it to be dangerous in its probable extension by the increase of Entails. It is also a fertile subject of litigation; and the cases to which it gives rise, are generally of an expensive and intricate nature.

Your impression is, that it is not founded in expediency with regard to the public interest, and that of the community in general?—Certainly; that is rather my opinion.

Do you consider it to be injurious, with reference to the interests of private parties, both possessing entailed property, and about to succeed to entailed property?—That question is one that is a little difficult to answer, because private individuals have, no doubt, opposing interests under Entails; and with regard to many persons who complain of the operation of Entails, they may also have profited by them in having got the property contrary to the ordinary line of succession; but with those explanations, it may certainly be stated that the operation of the present Entail law is often very inconvenient to entailed proprietors, particularly as far as regards providing for their families.

What do you consider to be the reasonable principle which ought to regulate the testamentary disposal of property?—The principle which has been generally considered as the chief ground for authorizing the power of disposal by testament, is the great encouragement which it gives to the acquisition of property; with the collateral circumstance that it procures respect and attention from those who are expectant, to the person who has the power of bequeathing. These seem to me the chief grounds upon which the expediency of the power is founded.

Do you think that those objects and views are satisfactorily secured by the tendency of the law of Entail?—It appears to me that the law of Entail goes too far in permitting that power, further than is necessary to promote the ends I have mentioned.

Do you think that a system, stopping short of the law of Entail as it exists in Scotland, and providing regulations for perhaps one or two generations, might be sufficient for all reasonable purposes?—I certainly do think so.

Could you state to the Committee your impression as to what is the point at which you think the advantage of regulation stops, and the evils of restraint commence?—That is a point of some difficulty, and has been differently settled in the laws of different countries. According to my present recollection, by the law of Rome, a party was only entitled to name an *heir*, but not an *heir to his heir*, that is to say, he might name an heir, and, in case of his not succeeding, another and another; but if an heir once took the succession, the testator could not name a further heir to the one so taking. This, I think, was the law of Rome.

Are you speaking of personal property?—Both heritable and personal. There was no distinction in the law of Rome in the mode of bequeathing real and personal property;

property; but I beg leave to state to the Committee, that not knowing what points I was to be examined upon, and not having the convenience of consulting books while in London, I feel rather unprepared on such questions, and give my opinion with some hesitation.

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What is the case in the law of France at this moment?—Upon that subject I must speak merely from information; but I believe that by the present law of France, a father has not the power of testamentary disposal in regard to land, but it is divided, by the operation of law, among his children, in certain proportions.

You state, that the law of Entail has given rise to very numerous and important litigations?—It has.

Have such litigations occupied a very large portion of the important discussions in the court of Session in Scotland?—Unquestionably they have; any person may form an idea of their extent, importance, difficulty and variety, by looking at the Dictionary of Decisions, under the article *Tailzie*.

Have not almost all important cases upon that subject been carried from thence to the House of Lords?—Generally.

Do you imagine that the result of all past litigation has been to establish and render clear almost all points in the law of Entail?—I can hardly venture to say that; new points are occurring every day. The decisions of the courts have no doubt cleared many points, but many points are still unsettled; and there has been a considerable discrepancy of decisions upon very important points of the law of Entail.

Has the effect of recent decisions been rather to unsettle the law that was supposed before to be established, or has it gone to confirm and render clear the views which have been entertained for a long period of the law in Scotland?—I consider that several very important recent decisions in the House of Lords, have gone very much to overthrow the pre-conceived ideas in Scotland upon the law of Entail. I allude particularly to the questions on the Queensberry leases, and the case of Agnew of Sheuchan; all those cases seem to me to have proceeded upon principles very different from those generally received in Scotland before.

Do you apprehend that the law of Entail in Scotland has now arrived at a distinct and established system, upon which lawyers can give positive and distinct advice to parties desiring to know and to act under the law?—I certainly do not think so.

Do you imagine that parties subjected to the fetters of Entail feel those fetters so inconvenient in the ordinary administration of their affairs, that there is a very frequent tendency to struggle against those fetters, and to extend their power as far as is possible?—I do consider that there is such a tendency.

Do you imagine that this arises from the unsuitableness in many cases, of the provisions of Entails to the reasonable wants of individuals, in a fair administration of their property?—To a certain extent I certainly do: at the same time there is a natural desire in mankind to escape from fetters of all kinds in regard to the management and disposal of property.

Do you think that the spirit and object of the statute of 1685 is suitable to the times in which we now live?—No; I certainly consider its operation as inexpedient in the present state of Scotland.

Do you think it is calculated to uphold the aristocracy in permanent wealth, and in circumstances suitable to the position in which they are placed in society?—Its tendency no doubt seems to uphold the aristocracy by preserving estates in one line of succession, and by preventing the power either of selling or of burdening with debt.

Do you mean the Committee to understand, that you think this law calculated to uphold the station of each individual as he succeeds to the estate, or only that generally the estate will be preserved in one line of succession, without reference to the pecuniary circumstances of the individual possessing it for the time?—I certainly alluded to the preservation of the estate chiefly.

Without reference to the actual situation of the individual possessing it for the time?—It rather appears to me, that if the question relates to the Act of 1685 alone, without considering the subsequent statutes, that the above Act has the effect of giving to the individual in possession the enjoyment of an income unincumbered with the debts of his predecessor; that it has also the effect of preserving an estate to a family unburthened with debt: so far I think it has a tendency to preserve the aristocracy of the country, whether the nobility, strictly so speaking, or the gentry.

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Have you any reason to know the opinions of the most intelligent persons, either connected with the law or otherwise in Scotland, respecting the law of Entail?—I can hardly venture to give an opinion on so general a point; but I rather should think that with regard to those who have no interest one way or another, and who may be considered as at once intelligent and impartial, the general opinion is, that the present law of Entail in Scotland is inexpedient.

Do you believe that entailed property is generally administered as beneficially as property that is held in fee simple?—I certainly do not; because in general the proprietor under Entail having nothing but the rents upon which to live and to provide for his family, has less to lay out himself, and can allow less to his tenants to lay out upon the land.

From the opinions you have expressed respecting the general policy of Entails, do you consider it of advantage that the system should proceed in Scotland as it is now doing?—No; I think it would be injurious to Scotland if it were to proceed to a much greater extent.

Do you apprehend that under a relaxation of the law, Scotland could give employment to large masses of population, and an extent, of capital which at present cannot be employed in the improvement of the land?—I certainly think that a relaxation of the law of entail and the means of borrowing and selling property more easily, would tend to increase the general employment of the community, the demand for labour, and the general prosperity of the country.

Does the spirit of the Entail law tend to promote cordiality and good understanding between members of the same family?—I should think not.

Is it in the power of a father, in the contemplation of his son's marriage, to make any settlement with reference to such an event upon an entailed estate?—He may make settlements on any child to the extent which the entail permits, which is very various in different Entails.

If the Entail does not provide any means of making such settlement, the father has no power under the general law, to make such settlement on the entailed estate?—A proprietor under Entail may advance or propel the succession to the eldest son, the heir *alioqui successaris*, and restrict himself to a life rent; that has been done in several instances; so that with regard to the next heir, there is this mode of providing for him during his father's lifetime, provided the father does not alter or change the other restrictions of the Entail.

Supposing a son to pre-decease his father, in such an event might it not happen that the family of such a son might be left without any provision whatever?—If the family consisted only of daughters, I think that consequence might ensue; but if there was a son, he of course would get the estate upon the decease of his father, after the propulsion I have alluded to.

In such a case might not his widow be without any provision for her maintenance?—Yes, provided the Entail did not permit any provision to be made for the widow.

Would it not tend to enrich families in Scotland, if, as in England, a father could make a settlement on his son in contemplation of his marriage, corresponding to the rank and fortune of the person he was about to marry?—I think it would tend to the advantage of families.

Have you had occasion to consider the operation of the Act of 10 George 3. chapter 51?—Occasionally, not very particularly.

Do you consider that that statute has produced the advantages with regard to promoting improvements, upon estates which seemed to be contemplated by the preamble?—I cannot answer to what extent it has produced those advantages, but I think it has to some extent promoted the improvement of entailed estates; because I understand that considerable sums have been laid out under that statute.

Are you aware of the difficulty of complying with the provisions of that statute, so as to be certain that all the technicalities required have been complied with?—There are certainly a good many technicalities of a pretty minute nature which require to be strictly complied with; but still, with reasonable attention, I think they may be complied with.

Are you aware that many cases have occurred in which it was believed that such technicalities had been complied with, and that in the result it has been found that the proceedings were irregular, and that very trifling instances of non-compliance have been found to vitiate securities founded upon that Act?—I rather think that there have been such cases, but I cannot at present name particularly any one.

Do

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Do you believe that the provisions of that Act with reference to leases, not building leases but leases of a more ordinary endurance, have had the effect to remove difficulties in the administration of property in that respect?—To a certain extent, I think that the provisions of the statute, as to the power of letting leases, have led to some improvement; but upon this point I must speak with great hesitation, because I have had very little experience in matters of that sort.

Do you consider it to be a point clearly ascertained what the powers of an entailed proprietor now are under that Act, as to leasing land for the ordinary purposes of agriculture?—I am not aware that there have been many questions upon that particular point.

Under this Act taken in connection with that of 1685, do you apprehend that the powers of entailed proprietors as to letting leases, are thoroughly ascertained, and not subject to doubt or difficulty?—I cannot venture to say that the provisions of the statute on this head are altogether free from doubt or difficulty; I think that the powers of proprietors under Entail have been, to a certain degree, improved by the provisions of this Act, but such provisions like all questions under Acts of Parliament may be subject to doubt and difficulty occasionally.

Does your experience enable you to state whether the difficulties of the Act of 10th George the Third, respecting improvements generally, deter those who would otherwise take advantage of its provisions from doing so?—I cannot answer that question from my own personal knowledge or experience.

Are you aware of the provisions of the statute of 5th George the Fourth, chapter 87?—I have considered that statute also.

Do you consider the principle of that Act to be sound and equitable, with reference to the interest of substitute heirs of Entail?—The powers permitted by that Act, certainly go very much to injure the interests and abridge the property of heirs of Entail in succession; in so far they are certainly unfavourable to them.

Do you consider it to be *pro tanto* a violation of the Act of 1685?—I certainly consider the powers allowed by the Act 1824, to be an infringement upon the principles of the Act 1685.

Have you had occasion to consider what the effects must be of that statute taken in connection with that of the 10th George the Third as to the extent of burthen which may be imposed upon substitute heirs, and the amount of revenue remaining undisposed of upon the succession of a substitute heir?—The opinion I would deduce from those statutes, must be what every gentleman is equally able to deduce from considering their different clauses. There is no question, that if an heir of Entail, in the first place, uses all the powers permitted by the 10th George the Third, and afterwards all the powers permitted by that of George the Fourth, he will very considerably abridge the rights of heirs in Entail.

Do not these two statutes amount to a perpetual power conferred on each heir as he succeeds, so far as it is unexhausted by his predecessor, to impoverish those who come after him in the succession to the estate?—Unquestionably to diminish the income of the person in possession.

Perhaps you have not had occasion to consider the arithmetical effect of these statutes upon succeeding heirs; if you have, be so good as state the result of that consideration to the Committee?—I am not altogether prepared to state it very distinctly; but it appears to me, that if under the Act of the 10th George the Third, one-third of the rental is assigned, and if under the Act of the 5th George the Fourth, the widow has one-third assigned to her; and there may be a second widow also, or a husband who may both have annuities under it; and if in addition to these burthens three years rent are left to children, I conceive that the heir in possession will run a great risk of being confined to the security of the last clause of the Act of George the Fourth, which declares, that he shall not be bound in any case to give more than two-thirds of his rental. I think if the powers of both those statutes were acted upon to their full extent, that the heir in possession would be confined to one-third of the income.

If so reduced to only one-third of the estate, such heir would have no power to provide for his wife and children?—No, I think not.

If so reduced, would not the heir also be obliged to defray from that one-third, all expenses of management, repairs, possible litigation in defence of the whole rights of the estate, possible litigation with tenants, and all the permanent and constantly occurring burthens which affect landed property?—I think he would.

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So that an heir in these circumstances would by no means remain in the possession of an undiminished third of the rental of his estate for the purpose of the maintenance of his station in society?—He would not.

Is it your opinion on the whole, that the law of Entail, as it exists under the original statute of 1685, and the subsequent statutes which have been referred to, calls for the consideration of the legislature?—It is my opinion.

Do you think that if Parliament should be disposed to provide a remedy for the future, that existing Entails should be left without any consideration to subsist in their present form and substance?—That is a question which I feel great difficulty in answering. The legislature might, no doubt, declare that the power of entailing should cease in future, and yet that the present subsisting Entails should remain; but I still think, that if some plan could be fallen upon to satisfy existing rights and expectations reasonably, it would be expedient to modify, to some extent, presently subsisting Entails.

Should you consider it an advantageous state of society, that a very large portion of Scotland, should be possessed by persons under one system of law, and that the remainder should subsist under a different system in all time coming?—I certainly should consider that an evil of its kind, and that it would be an advantage to remedy such an inconsistency if a remedy could be found.

What are your particular means of judging of the operation of the law of Entail in Scotland?—I can hardly say I have any particular means. The law of Entail has employed a considerable part of my professional studies, as it does of all Scottish lawyers, and I have also had occasional practice in such cases.

You have not been extensively concerned in the operation of these Acts?—The only concern I can be said to have had in them, is, that I have been counsel in several suits which have existed under these Acts of Parliament.

For what period of time have you been in the habit of turning your attention particularly to the subject?—I cannot say that I ever turned my attention very particularly to the subject. I have now been nearly thirty years at the bar, and of course have had, occasionally, opportunities both of studying that among other branches of the law of Scotland, and of being occasionally counsel in cases connected with the law of Entail.

From the experience you have had in your practice at the bar, have you had any means of judging as to the proportion of litigation which there is in cases under the law of Entail, and in cases of property not fettered by Entail?—I cannot accurately answer that question. I referred to the Dictionary of Decisions as a mode of judging both of the number of cases under the Entail law, and of their extent and perplexity.

That is to say you have no doubt that the number of those cases is very great, but you have no means of judging of their proportion to others?—Exactly so.

Do you know any thing of the particular evils that occur under the present operation of the law of Entail, such as the difficulties in improving land or the disagreements in families?—I know nothing particularly or practically upon those subjects, but there is a general impression in Scotland, that lands under Entail are not so much improved as unentailed lands.

Have you any facts you could state to the Committee, in order to illustrate the subject?—I could not state any facts.

Do you know any parts of the country in which the law of Entail has operated visibly against the improvement of the land?—I am not able to answer that question with any accuracy. I do not know the country so practically as to enable me to answer it.

You have stated, that you consider the law of Entail as preventing improvement, will you state the reasons why?—I think I mentioned before, that the heir in possession having nothing either to live upon or to provide for his family but the rents of the estate, he can neither himself lay out a large proportion of them or allow the tenants very largely so to do. Further, the Entail law altogether prevents sale; and sale either of a whole estate or in smaller portions, usually leads to improvements.

In the case of a proprietor of Entail wanting money to assist forward his family, at what rate of interest can he borrow that money?—As he cannot give security upon his land, it depends very much on his credit in other respects whether he can borrow at all. If borrowing from insurance offices is meant, of course he is liable to pay the high rates which those offices require; and he may in that way, no doubt, by giving part of his rents, borrow money.

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Are the Committee to understand that he must insure his life, and likewise pay interest for the money?—Yes, I think he must do so, unless he has other funds; I do not see on what credit he can raise money, unless on an insurance of his life.

It is then probable he may have to pay ten or twelve per cent?—It is probable he may.

You stated, that Entail has a tendency to uphold the aristocracy; generally speaking, do you conceive that the landed proprietors are as wealthy in Scotland as in England, possessing ready money?—Very far from it, I should think.

In proportion to their rental?—It is a difficult question; but I should suppose they have not generally so much money in proportion to their rental.

Do you conceive that the population surrounding an entailed property, are as well off, and that they receive as much benefit from the proprietor, as they would do in the case of an unentailed property?—I scarcely think they can receive so much; because the proprietor of an unentailed property can give further accommodations to his tenants; and there are various other ways in which there may be advantages to the people round about him, which cannot exist upon an extensively entailed property.

Then you conceive that the population generally suffers from Entail?—Yes, I do.

Are you able to state any thing as to the general feeling prevailing throughout Scotland, upon this subject?—I was asked before, whether I considered the opinions of enlightened and impartial men to be against Entails, and I stated that though it was a difficult question to answer, that I rather understood the opinion of intelligent and impartial men to be against Entails as at present subsisting in Scotland.

Are you at all aware of the feeling that prevails among the landed proprietors?—I am unable to answer that question.

Are you aware of the feeling that prevails in so far as regards the utter abolition of Entails?—I cannot answer that question.

You state that you have no local knowledge with respect to the effect of Entails upon the improvement of land?—No; I speak merely from general opinion.

And you have no particular acquaintance with the locality of Scotland generally?—Not such as to enable me to give an opinion upon so general a point.

You stated, that Entails were prejudicial to the interests of creditors; in what respect are they so?—In the first place they are prejudicial, because in the ordinary concerns of life, shopkeepers and others must trust to a certain extent entailed proprietors, and there have been instances where, upon the death of the proprietor, such persons have been unable to get payment. There have been also cases of a more extensive nature, where on the supposition that the fetters of Entail did not bind, creditors have trusted to a large extent, and have afterwards lost their money. I have in my mind particularly an important case, the case of Agnew of Sheuchan, where creditors supposing that the party held the estate in fee simple, trusted him to the amount of twelve or fifteen thousand pounds. The debts were found good by the courts in Scotland, but thirty years afterwards those judgments were reversed by the House of Lords, and the debts were all found bad. I mention this as an instance in which creditors may be injured by the uncertainty of the law of Entail.

Of course no Entail is effectual till recorded in the register of Entails?—No; the peculiarity of the case of Agnew was, that the Entail was recorded in the register of Entails while the proprietor appeared in the record of infeftments, as holding in fee simple; yet the House of Lords held that this circumstance was not sufficient to prevent the Entail from being effectual against creditors.

Is there not a very important question at present depending, arising out of that Agnew case, where large interests are involved, which arises solely out of the law of Entail?—There is a very important question, which I had the honour of arguing the other day in the House of Lords, the question of by-gone rents.

Can you shortly state what the substance of the Agnew case was, as affecting purchasers and creditors?—The case of Agnew of Sheuchan was this. A father-in-law and son-in-law (several years after the marriage of the *latter* to the only daughter and child of the *former*) executed a mutual deed of Entail, settling their respective estates on the son-in-law and daughter jointly, and the children of the marriage. This deed was recorded in the register of Entails, but no infeftment was taken upon it; and the father-in-law having lived for near eighteen years after this period, the son-in-law continued to possess his own estate during that time (appearing by the record of infeftments as unlimited proprietor), and contracted personal debts to the amount of about 10,000*l*. The father-in-law then died, and the son-in-law took infeftment on the Entail, and contracted still further debts to a small

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amount. On his demise the creditors raised a suit in the court of Session, to have their debts declared effectual against the estate, in which they succeeded by an unanimous judgment of the court, in the year 1784. The heir of Entail then in possession, in order to the payments of those debts, obtained a private Act of Parliament, to enable him to sell land to the amount of the debts, under the sanction of the court of Session. Such judicial sale accordingly took place, at which various purchasers bought lots of the property, and continued in unchallenged possession thereof for above *twenty* years. A new heir of Entail then succeeding, appealed to the House of Lords the judgment of the court of Session, as to the debts; and at the same time raised a suit in the court of Session, challenging the sales. The court of Session (on a remit of the appeal from the House of Lords) again unanimously sustained the debts as good against the estate, and confirmed the title of the purchaser. The House of Lords reversed both judgments; found that the debts could not affect the estates, and reduced the sales on the ground of certain informalities in the proceedings before the court of Session under the Act of Parliament. This was particularly hard on the purchasers, as from the long intervening delay, and the dispersion of the creditors who had received their purchase money, very little of it could be recovered. Such consequences could not have happened in the case of an unentailed estate, as it would have been clearly liable for the debts; and the proprietor could, at his own option, have sold land for their payment.

Does the law require, that to make an Entail complete there should be a registration of the sasine?—That was generally understood to be the law in Scotland; but by the judgment in the House of Lords in the above case, it would appear that their Lordships did not think this indispensible in order to prevent the contraction of debt. Before that judgment it was always held in Scotland, that to make an Entail effectual it was necessary both that it should be recorded in the régister of Entails, and that the infeftment upon it should be recorded (with all the restrictions, irritances, &c.) in the register of sasines.

In this case was it so or not?—In this case the debts were contracted after recording in the register of tailzies, but before recording in register of infeftments.

Therefore the recording of the infeftment was necessary to make the transaction originally good by law?—As against the creditors the regular course certainly would have been to have taken and recorded the infeftment immediately after executing the Entail.

Then the fault of all this arose from the omission of what the law required to be done?—Yes; but then the persons that profited by it were the persons in fault.

But the difficulties that were incurred arose from the omission in the first transaction, of doing what the law required, namely, recording the infeftment?—Certainly; but then, as I said before, the parties who suffered were not to blame for it.

Do not the intricacies of the law of Entail make it infinitely more probable that such omissions should occur in the transactions regarding property, than if there were no law of Entail?—Undoubtedly they make those probabilities more likely to occur; at the same time accurate proceeding and careful examination will, no doubt, tend much to secure from bad consequences.

Does it consist with your knowledge, that great pains are used in the conveyance of entailed property, to avoid those objections?—Certainly great pains are generally used.

You said that the law of Entail is a great source of litigation; are not questions of property a fertile source of litigation whether the property is entailed or not?—Undoubtedly; but entailed investiture is necessarily a greater source of litigation, because in very long successions there arise more intricacies; whereas if each individual had the power of leaving his estate to his next heir, there would be fewer of those.

Decisions in the House of Lords are of course held to fix the law absolutely?—They are.

And therefore so far as these points are determined by those decisions, they are held in Scotland to be absolutely fixed?—Certainly; unless altered subsequently by the House of Lords themselves.

You mentioned sale of entailed property for the debts of the entailer; can the court of Session sell those lands themselves in any cases?—I conceive that the entailer's debt falls, generally speaking, as a burthen upon the land, and that

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the creditor may make it effectual by adjudication and other means known in our law.

In certain cases where debts have been realized, has it not been necessary to come to Parliament?—In cases of any difficulty they generally apply to Parliament.

Do you think that if Entails were done away altogether, it would have the effect of dislodging all the old gentry of the land?—No; I cannot say I think it would have such a violent effect as that.

You said that you thought it upheld the aristocracy; do you mean the gentry as well as the nobility?—No doubt.

Do not you think it would bring new comers to the land, if the land was liable to be sold?—To a certain extent it would.

You mean by that, if Entails were altogether abolished?—Yes, if they were entirely done away with it would occasion a certain number of sales; but it would not lead to a general sale of all the property in Scotland.

Did you ever hear any proposition seriously made for sweeping away the existing Entails entirely?—No I never heard a proposition made in those terms.

Have you ever heard of an English nobleman buying land in Scotland for the purpose of locking it up under strict Entail?—I have heard of this.

If that were to become a common practice, that purchasers should be brought from England to buy land in Scotland, for the purpose of availing themselves of the power of interminable Entail, would not such a system produce in Scotland all the evils of absentee landlords?—I think it would.

From your knowledge of the history of the law of Scotland, have you any doubt that the statute of 1685 was passed, not for the purpose of upholding the aristocracy, but to prevent a specific grievance existing at that time; namely, forfeitures?—It appears to me, that it was passed for both purposes; I think it appears from Lord Stair's institutions in considering the famous case of Stormont and the creditors of Annandale, that at that time the general opinion of the powers of proprietors to tie up their lands from creditors, was beginning to give way. That question was decided by a very small majority. It seems to have been disapproved both by Lord Stair and Mr. Erskine; and I think that if it had not been for the Act of 1685, the next decision would probably have been given the opposite way; holding that at common law a proprietor could not exclude the claims of creditors, I think it was partly to avoid that risk, that the great families of Scotland procured the passing of the Act of 1685.

Is not the date of the Act the date of Argyle's insurrection?—I cannot at present speak accurately from recollection.

Is there not a statute passed immediately after the revolution, reversing 403 forfeitures, which had taken place under one statute in the reign of James the Second?—I cannot answer that from recollection.

With reference to the operation of the 10th of Geo. 3, is there not very frequently the greatest possible difference between the actual and the recorded outlay under that statute?—I do not exactly know. The party is certainly entitled, if he takes the proper means, to register his whole improvement, if it does not exceed the amount allowed by that statute, and for three-fourths of that he is entitled to charge the estate.

Is not the recorded outlay frequently much larger than the real outlay; and is it not used by the heir in possession as a means of raising a debt at his own disposal against the property?—I think there must be some want of regard to their own interest on the part of the substitutes, if that is permitted; because the law allows a pretty accurate mode of ascertainment by the improver lodging his outlays annually in the sheriff court, and giving notice to the next heir after his own family.

Is it not the practice of the substitutes not to interfere at the time of the outlay, but to postpone their objection till they come into possession, and then to dispute the whole of the outlay for the purpose of getting rid of the entire debt?—I cannot say that that is the general practice; but no doubt cases have frequently occurred where an heir succeeding has disputed the outlay, both in regard to the formalities of the proceeding and as to the nature of the outlay.

Do you conceive it probable, that improvements will ever be well done, or chiefly done, when one man makes them and another is to pay for them?—Certainly not.

Is not that precisely the state of the case under the Act of 10th Geo. 3, that one man makes the outlay, and leaves it to his heirs of Entail to pay for it?—It is so.

That is always supposing that the recorded outlay is the real outlay, have you not reason to believe, what is very notorious in Scotland, that the recorded outlay is

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frequently larger than the real outlay?—I cannot say that I have ever heard that this is the case; nor have I any means of knowing whether it be so or not.

With reference to the law of Entail upholding the landed gentry of Scotland, it is impossible now to view the statute of 1685 apart from the statute of the 10th Geo. 3, and Lord Aberdeen's Act; and you have truly stated, that the limitation of the operation of those two statutes has only by an assignment of the whole estate to judicial trustees, reserving one-third to the heir in possession; do you conceive that the dignity of any family can be upheld under Entail when two-thirds of the free-rents are gone?—Certainly those Acts have materially affected the operation of the Act of 1685 with regard to that point.

Do you conceive that the dignity of any family can be upheld under an Entail, when two-thirds of the free rents are gone?—I do not.

Viewing those two statutes, the 10th Geo. 3, and Lord Aberdeen's Act, in conjunction with the statute of 1685, and considering the natural tendency every heir in possession has to provide for his family at the expense of his substitute, have you any doubt that one or two generations hence the great bulk of the entailed estates in Scotland will be in that predicament?—I should think that a very considerable portion of them will be in that condition.

Do you consider that the dignity of a family could be upheld if all the estate was sold?—No.

Do you conceive that in two or three generations those estates would be sold if men had the power of selling them?—Some of them would.

Is it not the interest of all heirs in possesion to provide for their wives and their children under the provisions of Lord Aberdeen's Act to the full extent?—I certainly consider that it is.

If the heir in possession has inherited his estate, the powers given by the Act of the 10th Geo. 3, having been exercised by his predecessor, and should avail himself of the provisions of Lord Aberdeen's Act for the benefit of his children, must not that absorb the full two-thirds of the clear rent?—I think it would.

You have already stated, that the remedy for the heir in possession under such circumstances, is to make an assignment in the court of Session, of two-thirds of the rent appropriated; is not the tendency of that to introduce judicial trusts into all the entailed estates in Scotland?—It certainly has that tendency. The provisions to children would probably take a pretty long time to pay; during the interval if the rents were conveyed to a trustee, it would no doubt introduce a species of judicial trusts.

Is not the management of a judicial trust, most expensive?—It may be generally said to be expensive.

And the effect of that would be to transfer a great proportion of the power of all the landed property in Scotland to trustees, who are generally lawyers?—It would hardly, I should think, go so far as that. But, no doubt, such trustees would have a certain degree of influence.

If judicial trusts under this statute became general, the power whatever it is, of a judicial trust, would become general also over the entailed estates in Scotland?—Certainly.

Viewing it as a whole, do you think that a desirable state of affairs that a large portion of the great estates in Scotland, should be under a judicial trust?—No.

And yet you think that is the tendency of the law?—It certainly has that tendency.

Why should a great portion of the estates come into that situation?—If every landed proprietor with entailed estates, avails himself of this Act 1824, it must lead to a considerable extension of judicial trusts.

Will not the natural wish that every heir in possession will have to provide for his wife and children, lead him to avail himself of the provisions of Lord Aberdeen's Act?—I appears to me, that naturally it would produce that effect.

Is not the effect of Lord Aberdeen's Act, in as much as the heirs in possession are mostly the same as those who were in possession when the Act passed, yet a matter of uncertainty?—Certainly, it is quite prospective; there have been no questions tried yet, as far as I know, under it.

Is it not common for substitutes to concur in Estate Acts trenching on their nominal or contingent interests, from respect to the head of the family, from a conviction that they sacrifice only a very remote chance of inheritance?—I am unable to answer that question from my own knowledge. I am not aware that it is usual.

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Are you not aware that Estate Acts frequently pass, fixing a debt upon an entailed estate to which the estate is not liable, with the concurrence of the heirs of Entail?—I cannot say that I am aware of such a practice.

Is it not the purpose of the Act of 1685 taken by itself, that each heir should enjoy the property free of incumbrance during his life?—Certainly, the Act must have contemplated that result.

Are not both the Act of 10 Geo. 3. and Lord Aberdeen's Act, direct violations of that principle?—Certainly; I consider them as exceptions from or infringements of the original Act.

Have there not been various other great infringements upon the principle of that Act, such as the abolition of the heritable jurisdictions?—I am not at present prepared to say, how far that operated as an infringement.

Are you aware of an Act that passed, allowing the heir of Entail to sell superiorities to his vassals?—Yes.

Is not that an infringement of the Act of 1685?—I consider it to be so.

Are you not aware of an Act authorizing the heir in possession under strict Entail, to raise money for making roads and building a jail?—There are such Acts certainly.

Are not those infringements upon the principle of the Act of 1685?—They do certainly seem to me, to be infringements upon its strict principles.

Are you aware of any prominent or important advantage in preserving the present system of law of Entail in Scotland?—The only prominent advantage that occurs to me is, that it tends to preserve properties in certain families for a long period of time.

Do you apprehend from your general experience in Scottish law and the system of Scottish property, that the dignity of great families could be preserved by any other means?—I think it might, without so very severely restrictive a law as the present.

Will you point out to the Committee, how the dignity of the aristocracy of Scotland might be preserved by the other means, to which you have alluded?—I chiefly found my opinion upon the natural attachment to property, which one finds in all societies. This I think, would probably transmit through many generations estates in families, without the necessity of so strict a law.

Would you think that any approximation towards the system of the English law would do for the atmosphere of Scotland?—I can hardly presume to give an opinion upon the system of English Entail law, with which I do not profess to be acquainted, but as far as I know it, I think Scotland would be better with some approximation to that system than with its present one.

Would the abandonment in part of the present system relative to landed property in Scotland, be a change which would be very repugnant to the feelings of a great part of the landed proprietors of that country?—I can hardly answer that question as to the opinion of the landed proprietors of Scotland.

In Scotland, is not the land liable for all debts of every description?—At common law it is.

Are you aware of any distinction in that respect between Scotland and England?—I understand that in England land is not liable for simple contract debts, but in Scotland land is liable for all debts whether heritable or by simple contract.

Might that have any effect, supposing Entails done away, in depriving families of landed property?—I certainly do consider that system of the law of England which prevents land from being subject to simple contract debts, as a principle of preservation in England, which would not exist in Scotland.

Do you imagine, that in case the system of Entail in Scotland were relaxed, there would be any obstacle to the adoption of the same principle of law in Scotland which prevails in England, with respect to simple contract debts?—I have some difficulty in answering that question. The principle of our common law in Scotland is to subject all property to all sorts of debt. I will not say that some such provision might not be introduced into the law of Scotland as to exempt land generally from simple contract debts; but it is foreign to the present genius of our law.

Does any conclusive obstacle offer itself to your mind?—It is difficult to give an opinion upon that.

Are you aware that under the law of England as it now stands, the lands of traders are liable to simple contract debts?—I understand that to be the case.

Can an heir of Entail sell a superiority to anybody but his own vassal?—No, he cannot.

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If Entails were done away, could not the proprietors of entailed estates dispose of superiorities to any body?—They could.

What effect would that have upon the representation of Scotland?—It would probably increase the splitting (as we call it) of the superiorities, and increase the number of voters.

And give proprietors of large estates more influence in the counties?—Unquestionably: only the influence of a proprietor over the person to whom he grants, must be of a very concealed and indirect nature, because now fictitious or confidential votes are not allowed. Such a proprietor might, no doubt, give life-rent votes to a considerable extent.

Do not such votes exist in reality?—I cannot presume to answer that as far as regards nominal or confidential votes.

Has the effect of Entails yet produced any want of land in the market?—I am not aware that there is any great feeling of want of land in the market.

You said, that in your opinion, great inconveniences would result from certain properties being held under Entail and other properties not?—Not great inconveniences, perhaps, but inconsistency.

Is not land held in that respect at present, under different rules and different restrictions?—I understood the question to be, whether it would not be inconsistent if a great class of the community held the land under strict Entail, and another class could not put it under Entail at all; that was the inconsistency I alluded to. In point of fact, it would not be different from the present state of matters, because at present a certain portion is held under Entail, and another portion not under Entail.

With regard to the supposed necessity of Entails for preserving estates in families, are you aware that at the present moment there are some of the greatest estates in Scotland not yet entailed?—I am perfectly aware of it.

Are you aware that several of the great families have only entailed their estates lately?—I believe that is the case.

Then in point of fact the estates have continued for several generations in the same family, without any Entail having been made?—Unquestionably for a very long period.

Are you aware whether or not those estates are in a higher state of improvement than those in which Entails have subsisted?—I cannot answer that.

Previous to the passing of Lord Aberdeen's Act, suppose a person had an estate in fee simple as well as an entailed estate, the provision he would naturally make for his family, would be by a charge upon his fee-simple estate; what would be the case since the passing of Lord Aberdeen's Act, provided he had only daughters who could not succeed to the entailed estate, and the entailed estate was to pass from him to a distant substitute, would it not be that he would charge his entailed estate with a jointure to his wife and a provision for his daughters, so as to burthen his substitute, and keep his fee-simple estate free?—I think that would be the natural result.

If under Lord Aberdeen's Act an assignment were made to a judicial trust, upon a fixed rental, and two-thirds of the clear rent were assigned to the widow and children, and one-third only to the proprietor, and rents fell; on whom in your opinion would the loss fall?—That is a difficult question, and has not been tried; it is alluded to in the last clause of the Act 1824, but I will not take upon me to say what would be the result.

Then it is a matter of doubt in your opinion, as a lawyer, whether it would not fall upon the one-third reserved to the proprietor alone?—It being still a matter untried by a court of law, I do not think any lawyer can venture to say what would be the decision.

You have said, that one of the principal objects of the statute of 1685 was to guard against forfeitures, which were still further guarded against by a subsequent statute of 1690; are you aware of a statute of the 7th of Anne, passed after the Union, extending forfeitures for treason and corruption of blood to estates in Scotland, although entailed?—I believe there is such an Act.

Would not such an Act be a decided infraction of the principle of the statute of 1685?—I should rather think it was.

What is the extreme period for which you conceive a tenant in strict Entail in Scotland can let his lands?—Almost all Entails have a peculiar provision for that purpose; but by the recent decisions in the Queensberry cases, I should hold, that at common law the ordinary lease of twenty-one years would be the extreme.

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Under the 10th of Geo. 3, do you conceive that the clauses which that Act contains, would fetter a landed proprietor so much that it would be almost impossible to let his land for thirty-one years under that Act?—I believe there have been several instances of leases having been let under that Act: I am not prepared to say how far the proceedings are much fettered by it, but I believe there have been instances of people having availed themselves of the Act of 10th Geo. 3, to let such leases.

Is not the principal obstacle to the extension of that Act, the unwillingness of tenants to expend money?—Yes, upon properties that require a large outlay.

Is there not a case decided in the court of Session with respect to the statute of 1685, that a lease for thirty-one years is an alienation in contravention of the statute?—I do not at present recollect the shortest period of lease which has been held an alienation.

Is there not a decision that a lease for twenty-one years is not an alienation?—I should conceive that a lease for nineteen or twenty-one years would be reckoned a *bonâ fide* lease.

Has there been or not any doctrine of late springing up in the court of Session in Scotland to this effect, that by some species of conveyance within the terms of the original deed of tailzie, there is some way of defeating the provisions ultimately of that Entail?—I am not aware of any such practice. No doubt the heir of Entail if he chuses to venture, may make up his title in fee-simple, and if he holds it for forty years he gets free from the Entail, but still he runs the risk of losing his estate.

Are there many acts by which a tenant in tail can forfeit his estate?—That depends upon the provisions of the particular Entail; they chiefly regard altering the succession, selling or contracting debt, sometimes the bearing the name and arms, and various things of that sort.

Where there is wood upon property and no particular provisions in the deed of Entail, what are the rights of the tenant in possession?—The tenant in possession may cut the whole wood.

If it is not actually cut at his death it must remain?—If it is standing it must not be cut by his executors.

Do you not consider that there is a great portion of land entailed in so far as regulates the succession, which does not appear in record?—There probably is a certain proportion but I am unable to state what that may be; I should think there is not a very large proportion under Entail not recorded.

But property so entailed is subject to creditors?—It is subject to the claims of creditors if not recorded.

Is it not a very common occurrence that large farms are conveyed to trustees for the purpose of being under strict Entail?—I believe very common.

In a case of Entail regarding merely the succession not recorded, would it be competent to the heir in possession to mortgage that estate for its full value?—He might mortgage or sell, and to the purchaser it would be a good sale; but the subsequent heirs of Entail would have an action against him to reinvest the money in other land.

If the estate is liable to the creditors, that estate is a good marketable security?—Certainly.

Therefore the heir in possession might raise money to the full value of that estate?—I conceive so.

That estate therefore would be liable to those creditors to its full value?—I conceive so.

In that case he would defraud the succeeding substitute heir?—Yes; but supposing he had borrowed 100,000*l.*, if he had the 100,000*l.* still unspent, the heirs, substitute or remainder men would have an action against him to make him lay it out again on land to be entailed.

Would it be good as regards the creditors, if the creditors had a distinct knowledge that the property was entailed?—I think it would be good as to them; because they are entitled to look at the records, and to trust to them.

Could a person in possession of an un-recorded entailed estate, grant a mortgage upon that estate?—I do not see any thing to prevent him. It would be good to the creditors.

Supposing an estate under those circumstances, rendered liable to the creditors for its full value by the heir in possession, would those creditors be able to make good their claim for the full value of that estate, against the substitute heirs in possession?—Certainly.

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Can the next heir in succession, compel the registration of the deed?—Certainly, at any time.

Or any substitute, however remote?—Yes.

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Are you aware that Estate Acts have passed, letting in debts under doubtful circumstances on entailed estates, the consent of the different heirs of Entail being given in proportions varying according to their proximity to the succession?—I understand that Acts of that nature have been recently procured; particularly in cases, where from the forms in the strict Entail, it was not otherwise possible to get the debts liquidated by a sale of the land.

You have stated, that in the case of an heir of Entail in possession of an unrecorded Entail, he might contract a debt to the full value of that estate and make the debt good against the estate; supposing a heir of Entail were to contract a debt to the extent of the full value of the estate, and were to will the money so obtained to his children or to any other person, would that substitute heir have an action against those persons for the money so obtained by the previous heir of Entail?—I rather think he would have action to have the money reinvested in land and re-entailed; for even though unrecorded, it is good *inter hæredes*.

Suppose he had spent the money, is there any remedy?—None, that I know of,

Suppose on an unrecorded Entail that the person holding the property, were to grant heritable bonds upon that property to each of his younger children, would not they be good against the estate?—I can see nothing to prevent that, provided the words were considered as strictly onerous obligations.

In your opinion under the present law of Entail, there are a great number of doubtful points?—Certainly, many doubtful points.

Do you think, putting aside every other consideration, it would be highly expedient to have some legislative measure to free entailed property from the entanglement of those doubts?—Certainly; if that could be done it would be very important.

Richard Alexander Oswald, Esquire, called in; and Examined.

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ARE you the proprietor of very large and valuable estates in some of the southern counties of Scotland?—I have been in possession of considerable entailed property in the county of Ayr and the stewartry of Kirkcudbright, since the year 1792.

Is the whole of the property you possess entailed?—It is all entailed; I stand possessed of part of it, of which I was originally the substitute; my father holding part of it under the Entail before, which has now come into my possession, the other part has gone from my possession to my sons; but in speaking of it, I shall speak of the whole generally.

Is the Entail under which you possess, of that peculiar character which excludes heirs female?—It is.

Consequently it is an Entail of the most strict kind known in the law of Scotland, in reference to succession?—It is under strict Entail and under irritant clauses; every Entail has its own particular clauses; and in speaking of Entails in Scotland, one cannot speak of them generally, except as being under strict Entail, which mine is.

Having possessed that property since the year 1792, you must have had very long and extensive experience as to the effects of the law of Entail, upon the administration of lands in those circumstances?—I have.

Will you have the goodness to state what impressions you have received in that experience, as to the operation and effect of that system of law?—It is difficult perhaps, to state them all; but the leading difficulty of all entailed property, in my opinion, consists in this, that the nature of the possession is more of a life-rent, than an absolute property. The consequence is, that the property or the possession is divested of every direct benefit that can be obtained from it, and those you can derive from the possession are hampered by legal restrictions, which involve you in an indirect management instead of a direct one. This deteriorates the value of the property, both to the possessor and every person connected with it.

Does the law of Entail, so far as your experience goes, very much embarrass the proprietor of the estate for the time being, in his general system of administration?—In every point.

Does

Does your experience enable you to state, that the law of Entail interferes materially with the Agricultural improvement of property?—Particularly so; more than in any other point perhaps.

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Be so good as inform the Committee, in what respects you have found that it interferes with such improvement?—I should say that it does so generally in every respect. A great part of those properties that have come under Entail within the last forty years, were, at the time of being brought under the fetters of Entail, greatly in want of improvement; they were in a state of great destitution, and required almost every thing done to them. The possessor of an entailed estate draws from it merely the rents, which are not adequate nor nearly adequate to the common purposes of fitting the estate for improvement; and without he has funds from some other quarter, he has not the means of commencing anything like improvement except through the intervention of tenantry, or some other indirect method; he cannot do it directly from the funds of the estate, from the circumstance of his not being able to give any valid security upon the estate.

You apprehend that the entailed proprietor, if he wishes to apply funds to the improvement of his estate, must resort to more than ordinary means in order to procure those funds?—He must either procure the funds himself, or he must adopt another measure which has been very general, and under which I should think a great proportion of the improvement that has latterly gone on in Scotland, has been carried on; that is, of granting leases under such terms that it becomes the interest of the tenant to make a great part of the outlay. This gives a character to improvement in Scotland very different from what gentlemen in England are apt to imagine. It becomes an improvement for a particular purpose, and calculated to last only to a particular date, and it leaves the estate not improved to the degree that people may imagine. It is a scheme between the parties to take as much as they can out of the estate, instead of being a scheme for the gradual improvement of it.

You mean, that what has been frequently considered as an improvement on the part of the landlord and tenant acting conjointly at the time, has resulted not in the improvement, but in the permanent injury of the estate?—A permanent injury may, and often does result from it. But what I mean to say is, that it is a scheme in which a great part of the outlay must be calculated to be returned within the lease; it is not a plan of gradual steady improvement, which is the best suited to all kinds of land.

Supposing the landlord has induced a tenant of enterprize and capital to undertake improvements upon a farm, has the landlord any power of enabling that tenant to be indemnified for the outlay of the money he makes?—It must be so calculated as for the tenant to reap the advantage of the outlay of his capital, and to get back his capital within the lease.

Supposing a tenant undertakes to lay out a sum of money upon farm buildings, or for other purposes, to be repaid at the end of the lease, can the landlord give to the tenant any security for such repayment under the law of Entail?—Not if the estate shall pass from that possessor; he may give his own personal engagement, but he can give no right to recover it from the estate.

Have the difficulties of managing entailed estates increased of late years in the present state of the country?—They certainly have increased under present circumstances upon entailed estates, because it is of frequent occurrence in Entails that the possessor for the time would commit an irritancy if he were to lower the rent, that is to say, if he was to let the farm at a lower rent than it was let at before; and under these circumstances when rents have so generally fallen, there are few farms that were let at what might be called high times, that would now let for anything near those rents.

What must happen if a tenant having taken land in high times, comes to the landlord and says, that he cannot pay his rent; what must be the mode of settlement between the landlord and tenant?—The landlord may insist upon the rent, if the tenant cannot pay; it is in the power of the landlord to take the farm out of the hands of the tenant, without giving him an opportunity of getting back any part of the capital he may have sunk in the farm.

And that notwithstanding he may have invested a large capital in improving the farm?—Whatever capital he has invested in it; except so far that the landlord has the power, during his own life, of accepting what rent he chooses, but he cannot secure the tenant against his successor going to the full extent of the written agreement.

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Could not an unentailed proprietor, in those circumstances, by diminishing the rental according to the just rights of the tenant, enable him to go on with the farm for the joint benefit of both landlord and tenant?—Certainly he might make a fresh arrangement suitable to the circumstances.

But from making such fresh arrangements suitable to the circumstances, the entailed proprietor is shut out, as he is bound by the Entail not to make any arrangement by which he would lower the rent?—He cannot make any such arrangement as would be binding upon his successor, he may make such arrangement for his own life.

Could not a fee-simple proprietor make certain to a tenant the possession of an estate for the endurance of that lease, without reference to the life of the lessor?—A fee-simple proprietor can do what he pleases at any time.

Is it not beneficial that there should exist such discretion in the proprietors of land?—I consider the want of discretionary power one of the greatest evils attending the Entail of land, particularly in the connection between landlord and tenant.

Have you had occasion to turn your attention to the Act of 10th George 3, chapter 51, with reference to the powers conferred upon entailed proprietors to make improvements upon their property?—I have.

Do you consider that that statute has afforded important facilities to Entail proprietors?—I consider that it has not; I consider that the statute, in as far as regards the improvement of the estate, except, perhaps, by enabling improvements to be commenced in one generation, goes effectually to increase the cramping power of the Entail, because it puts it less in the power of succeeding heirs to do any thing towards improvement.

Do you think that to the heir in possession for the time being it gives important and effectual facilities?—It gives some facility but not important, because it does not give powers sufficient to obtain what is usually required upon an entailed estate to make any effectual improvement.

Have not the difficulties of a possessor availing himself of the provisions of that Act, been such as to restrict materially the operation of it?—The operation is difficult in the mode prescribed by the Act. Another difficulty arises from a circumstance that perhaps the Committee are not aware of, that in copying that Act of Parliament into Erskine's Institutes, which is the law book by which most country practitioners were guided in carrying that Act into effect, it was by some means erroneously printed, which led many people into error.

In point of fact have you yourself derived any important advantages from that statute?—In a certain degree I did avail myself of the statute, and have created securities against the estate.

Did you find the powers conferred upon you thereby, very far short of what the interest of your estate required?—They were quite inadequate.

Do you consider that the law of Entail has had any effect within modern times in aggravating agricultural distress in Scotland?—It certainly has, in diminishing the power that the landlord had to meet the circumstances of the times, by making fresh arrangements more suitable to those circumstances; and it has had another effect, that it has not only prevented the natural course of improvement, but obliged the tenant acting upon his immediate interest, to take every means in his power to obtain present advantage, without looking to the future effect it would have upon his management or upon the estate.

Speaking generally, what do you conceive to be the present situation of proprietors of land held under Entail in Scotland?—I consider they are very much cramped in their exertions, either as to giving effect to a beneficial system of carrying on agricultural improvements, or even keeping things as they are; and still more so in doing justice to those tenants with whom they have made arrangements of a mixed kind, where the outlay upon the estate was between the landlord and the tenant.

Do you conceive it is possible under the present law, for possessors of entailed lands to act with justice to their tenants and to preserve their estates in good cultivation?—No, I do not.

Is it your opinion, therefore, that the present state of the Entail law of Scotland calls loudly for the interposition of the legislature?—It is my opinion decidedly.

Do you think that the interest of heirs of Entail in succession, and the general interest which the country has in the good cultivation of the soil, can be provided for without some alteration in the present law?—No I do not; I should consider that the interest of succeeding heirs is more materially affected by the present situation

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ation of things than perhaps even that of the present heirs; the effect I believe generally in Scotland is, that any thing that has been done in the way of improvement on many entailed estates, is going back with greater rapidity than it was advanced.

Do you think that besides the tendency to affect the state of improvement, the law of Entail has any tendency to deteriorate the moral feelings of the parties connected with land, in the capacities of landlord and tenant?—I think it has had a very great effect in doing away with the good feeling that ought to subsist between the two, generally throughout Scotland.

Do you think that this has resulted from the disposition of landlords in general, or from the incapacity which they have found themselves under to act up to their inclinations towards their tenants?—Chiefly from the incapacity to do what they themselves would have thought right, and often from their not fully understanding the nature and extent of expectations formed upon the arrangements made with the tenantry in the management of their estates.

What do you consider to be the position of an entailed estate under the management of trustees, as it affects the interest of tenants?—The trustee is placed in that position, that he must make the most of the estate without regard to the consequence, either to the tenant, or to the landlord.

Must not such system affect most injuriously the condition of estates, if continued for a length of time?—Certainly it must.

Must not the heirs about to succeed, therefore, suffer perhaps more than the party in possession for the time being?—I should apprehend that they will suffer more; a great deal must depend upon the length of time that the estate undergoes that management, and upon the circumstances attending the estate.

Upon the average of cases, must not the effect of improvements, however beneficially made, be in a great degree exhausted, if such management endures for a considerable time?—In a very great degree; under the 10th George 3, plantation has gone on to a considerable extent in Scotland, and it has been charged against the estates; under such circumstances the whole that has been done has been defeated, because the trees are cut and sold before they come to any maturity, and can never benefit the succeeding heir, who is to pay the whole expense of the plantation. The same thing may be said of almost the whole of the agricultural buildings that have been built in the view of changing from one mode of cultivation to another, if they are allowed to decay. These are the improvements that have generally been charged against the succeeding heir, and under present circumstances they will not even remain upon the estate when it shall come into his possession.

Have you had occasion to consider minutely the provisions of the Act of the 5th George 4, chapter 87?—No. My attention has not been so much drawn to that.

What are your impressions as to the effect of any measure that might be devised for the relaxation of the fetters of the Entail law upon the permanence of property in the hands of the gentry of Scotland; do you think that it would tend greatly to reduce the wealth of families, or do you think it would tend to their substantial and permanent endurance as names known to the country?—I should think it would be greatly for the benefit of the landed proprietors of Scotland, and I should consider that it would keep them in a more permanent state of respectability than the present system of Entail law. I apprehend there is nothing that derogates so much from the real respectability of landed proprietors, from the highest to the lowest, and nothing so adverse to their interest and their good feeling, as the Entail law as it stands in Scotland.

Then it is your opinion, that although very possibly portions of land at present under Entail might come into the market, if it were so permitted by the law, it would not be the desire of entailed proprietors to indulge largely in the dilapidation of the estates?—By no means; I apprehend they would in most cases keep their estates, if not in point of extent, greater in value, and their situation would be much more respectable in the country.

If some relaxation were permitted, should you not think that a fresh stimulus to improvement would be very generally given, and that not only individuals but the public might be greatly benefited by an accumulation and addition to the general wealth of the country?—I should decidedly think so, and that the families of proprietors would be greatly benefited, because the present system leads the entailed proprietor to make whatever he can out of the land, in order to provide for his family, and to leave the land worse than he found it, to go through the same process in the next generation; whereas if he had a real interest in the land he could improve it and provide for his family.

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Are there not many cases where it would be possible to make pecuniary arrangements with regard to estates, which, under the existing fetters, are extremely injurious, but which under a relaxation of the law might be very trifling burthens indeed upon the property?—I think there are in the south of Scotland; I am certain there is a great proportion of the land that might be doubled in value, if one half were sold and the price laid out upon the other; and that one half would then be of more value than the whole is at this moment.

Do you apprehend that if there were any power of sale permitted to entailed proprietors, there would be many cases where anything like half the estate would be sold?—I apprehend not; and that there would be little land brought into the market if the entail was done away altogether, much less than is generally supposed.

But the immediate effect of some relaxation in the law you consider to be, not to lead to the sale of land, but merely to the modification of transactions, and the settlement of affairs in such a shape as would put the individuals in possession in a satisfactory state with a view to the improvement and the management of their property?—That would be what I should expect from it.

Are you not of opinion that great benefit might be conferred upon the public in Scotland, and upon individuals in particular, by some relaxation in the law of existing Entails, by no means going the length of an entire abolition of the Entail system?—I am of opinion that any relaxation would be beneficial.

Do you not think that such relaxation must go to the principle of the law, and not merely to the establishment of new palliative measures, such as those which have been found inefficient?—I apprehend it must be a change in principle; I am certain that the effect of the Act of 10 George 3. has already done more mischief than it has done good.

Will you point out specifically, some of the principal evils resulting from the present system of the law of Entail in Scotland?—The great evil that appears to me to result from it, is, that it forces the proprietor to do every thing indirectly; it makes it the positive interest of the proprietor and the tenant in all arrangements, to lay a burthen upon the property indirectly, in ground of the Entail being precluded from doing it directly, by imposing on it such proportion of the burthen as it ought to bear.

With respect to family arrangements, where there is a large family will you point out what evils result from such a state of things?—If the Entail gives no power to make provisions, such provisions must rest on Lord Aberdeen's Act. Under most Entails certain provisions may be made; they are limited, but there generally is a power to burthen the estate to a certain extent, which varies according to the particular Entail.

Where no provisions are made in the original deed, are the clauses in Lord Aberdeen's Act sufficient to give relief where a man is burthened with a large family?—I cannot speak to that, but the effect of them goes to deteriorate the situation of the next substitute.

Could you point out any particular state of family circumstances, that would exemplify the evils of which you have been speaking?—In the case of the estate going in heirs male, where the person in possession of the estate has but one son and several daughters, he is placed in such a position that he can do little for his daughters; especially if he raises a fund for the improvement of his estate, in which case it goes with the estate to the next possessor; if on the contrary, he accumulates money for the purpose of providing for his younger children, he diminishes his power of making the most of his estate; and I should wish the Committee to bear in mind that a landed estate in Scotland requires much more outlay to bring it into a productive state, than is the case generally in England.

Do you then consider that from the present system of Entail law in Scotland, great evil results with reference to the general prosperity of the country?—Decidedly so.

You state, that you have had occasion to resort to the powers of the Act of 10 Geo. 3. and you said, that you found those powers very inadequate for the purpose?—I stated, that I did not consider the power under the 10th of Geo. 3. adequate to the improvement I considered my estate to require. I did not at one time take any advantage of that Act, considering that I had it in my power to make the improvement, without availing myself of the powers conferred by that Act or of bringing any burthen upon the estate.

Then if that estate had not been fettered by Entail, would you have thought it expedient to burthen your estate to a greater amount than one-third of the income?

I do

—I do not know that I might in all cases; there are cases in which I would think it expedient. *R. A. Oswald, Esq.*

If you did not avail yourself of the full powers the Act gave you, how do you know that it would not have answered your purpose if you had done so?—I know the extent of my outlay to have exceeded the powers granted by the Act. My not having afterwards applied to this Act as far as it would go, was my not having given the notices as required by that Act. 20 March 1828.

Did you find, that the formalities and other complicated provisions of that Act rendered your resort to it difficult?—I have since found that they do so, when I had occasion to resort to it.

If you had availed yourself to the full extent of the Act, you think that a burthen on your estate to the amount of one-third of its income, would not have been sufficient for the purposes of improvement you had in view?—I could not have made many improvements, which I have done, under the provisions of that Act.

You found when you resorted to that Act, that the powers of it were inadequate for the purposes of improvement you had in view?—I considered them quite inadequate.

What were your desires with respect to the improvement of your estate at that time, for the execution of which you found the Act inadequate?—The specific purposes which required considerable outlay, were building farm houses, inclosing and draining, planting, and making roads; but I had begun those operations and executed them to a large amount, without giving the notice; I should have said that it was inapplicable, when I said inadequate.

That is to say, you found that under the Act of 10th George 3, you had not the power of raising a sum sufficient for what you considered the requisite improvement of the estate?—For what the estate absolutely required.

Supposing you had not begun those improvements before you had availed yourself of the Act, do you conceive that the powers of that Act would have been sufficient to execute the improvement which you did execute from other funds?—They would not.

Was not part of the property which constituted that estate, property reduced to the very lowest degree, by the condition in which it had been before it was purchased by your predecessor?—It was; it was from that circumstance that it required so much to be laid out upon it.

Do you attribute the state in which you found your property at all to the operation of the law of Entail?—Certainly not, for the land had not been under Entail before it was purchased, it was attributable to other circumstances.

Then those circumstances were such as might have affected the property, even supposing no law of Entail had existed?—Certainly.

Have you applied your mind much to agriculture?—To the general improvement of land, I have for the last thirty years.

Are you much experienced in the management of landed property?— I have; in the management of my own estate for thirty years, and a good deal of experience otherwise in the value of property around me, from having acted as commissioner under the property Acts in the county during the whole time of the continuance of those Acts, by which I think I have had considerable experience; and I have had an opportunity of seeing the difference of improvement between the lands held under Entail, and the lands not held under Entail.

And it is the result of your experience and observation in the district you are acquainted with, that lands held under Entail are generally in a less improved state than the lands free from Entail?—Decidedly; I can speak to that for the whole of the south of Scotland with some few exceptions.

You are perhaps aware that there are various districts in Scotland, for instance the Lothians, and some other districts, which are considered as amongst the finest agricultural districts in this island, and that within those districts there are great entailed properties; how do you explain the apparent inconsistency between that circumstances and the opinion you have expressed?—I believe the best improved part of the south of Scotland is East Lothian, in which there are many large estates. The circumstances of the proprietors of which have in general enabled them to contribute a large proportion of the outlay that has taken place upon those estates; and about thirty years ago when agricultural improvement came to be more in request from the circumstances of the country, the tenants were also able to do their part; but I apprehend, that even in East Lothian, which I consider to be the best part of Scotland as far as agricultural matters are concerned, the improved

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position in which it stands now, is owing more to the exertions and the outlay of the tenantry, than to the capital laid out by the proprietors.

That land is in many instances under the law of Entail; is it not?—In many instances it is under the law of Entail.

Do you attribute much of the improvement of that land to the powers the proprietors may have had of applying other funds?—I cannot speak to that particularly.

Are you able to state, whether many of the estates in those districts have been entailed within the last fifty years?—I cannot speak to that; but I can say, that entailed estates were the last to undergo the process of improvement, and are not the highest improved at this day.

You state that distinctly as the result of your experience?—I state that from my own observation.

Is not a very considerable proportion of the superior cultivation of the Lothians, dependent upon the vast superiority of its soil?—Partly it is; it has also been the longest cultivated of any district in Scotland.

Does the observation you made in the early part of your evidence, as to there being an apparent improvement in certain districts, arising from an outlay on the part of the tenant at the commencement of the lease, with a view of, before the close of the lease, taking it all back again by over cropping, apply to the Lothians?—I have known that to apply very strongly at different times in parts of the Lothians; I have known the lands in East Lothian to fluctuate greatly in point of value at different times, from that circumstance.

Is it not common, under long improving leases, for the tenant at the commencement of his lease to make a large outlay; and unless, some years before the termination of the lease, he can renew his bargain with the landlord, to take it all back by extra cropping?—It enters into the calculation of every tenant in Scotland.

Is there any difference between entailed property and unentailed property in that respect?—There is a very great difference; for the proprietor of an unentailed property can do what share of the improvement he pleases, because he has the means of getting credit upon his estate; the entailed proprietor has not that means, and he must be content to do it by allowing the tenant or the capitalist to furnish the means, and of course to take a greater proportion of the profit.

Are not the technical difficulties in raising money under the statute of 10th Geo. 3, such that it is not in Scotland considered a marketable security?—It is at least a security that is looked upon with great jealousy.

Have not there been so many decisions upsetting securities that were conceived valid under that statute, that now it is almost impossible, friendship apart, to borrow money under that statute?—I believe that it is so.

You said, that in Scotland in making agreements for a lease between the landlord and the tenant, they are, generally, in the habit of entering into such an agreement, as that the outlay of the tenant may be repaid within the period of the lease; do you mean to say, that they are in the habit of building houses and other buildings, and making dykes, with a view of merely lasting for the currency of the lease?—I mean to say, that it was the general mode in Scotland for the landlord and the tenant to make a calculation of what is to be done during the currency of the lease, and then the rent is fixed with reference to what proportion of the expense which the landlord is to bear, and what the tenant is to bear, but that the tenant makes his calculation in such a manner, that he may be repaid during the currency of the lease for such outlay as he may make along with the profit he derives from the farm.

Then you mean to say, that the different buildings upon an entailed property are generally in a very inferior condition to those upon an unentailed property?—Generally; indeed so much so, that any man riding through the country may point out entailed properties from their appearance. I speak not without exceptions.

Do you conceive that the poor districts in Scotland have suffered more from Entails than the rich districts, from the circumstance, that in rich districts the return is quicker and larger, while in poor districts the return is much more tedious and small?—I consider that to be the case from those causes, and from another cause; that as in rich districts the return is better, and can be calculated upon with more certainty, a class of people will take land in those districts that will not take it in poor districts, and therefore on them it is taken by a class of people who have less to lose or put in hazard. I object to the law of Entail, that it forces agri-

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cultural improvement into a speculation, instead of its being a progressive course of amelioration.

Is it not a matter of general notoriety, that entailed proprietors in Scotland are generally in very embarrassed circumstances?—I believe it is, and that the Entail often is the cause.

Has much of that embarrassment, in your opinion, arisen from the improvements which entailed proprietors have made upon their property?—In many cases it has.

You stated, that a person riding through the country might generally distinguish between an entailed and an unentailed estate, by its appearance; if a stranger, riding by your property at two different periods, the one before you came to the property, and the other after you came to that property, had judged upon those grounds, would he not have been mistaken?—It certainly came under Entail at the time it came into my hands, though part of it was not under Entail before. What I meant to say was, that generally entailed properties, when compared with unentailed properties, are in a much lower state of improvement, and so much so as to be visible to a casual observer. I state that from my own knowledge.

Are you aware that many landed proprietors in Scotland are in possession of estates, not as natural heirs, but from the selection and good will of the person who entailed the estate originally, and settled it upon them in succession?—Certainly.

From the result of your long experience, and your knowledge of the state of agriculture in the south of Scotland, when you compare the present condition of the great entailed estates with that of the possessions of the smaller proprietors in your immediate neighbourhood, what is the inference you draw with respect to Entails being favourable, or not, to the improvement of the land?—The inference I draw is, that the Entail is decidedly unfavourable to the land.

That is the inference you draw from your general knowledge of the progressive improvement of land in the south of Scotland?—It is decidedly in favour of unentailed land.

Is not this the alternative that presents itself to an heir under strict Entail, either that he must improve his estate and leave his family unprovided for, or if he provides for his family, that he must leave his estate unimproved?—Certainly; I should say it is the interest of every entailed proprietor not to improve his estate further than to take out of it whatever he can.

Are you aware of any Entails of large estates, executed in the south of Scotland during the time of the high war prices, in which there is a clause inserted, that no leases shall be granted for less rents than were paid during the time of the war, without all the farms being let by public auction?—I have heard of such Entails even executed at that time, but there are many where the same prohibition exists and applies to leases let at those times, though the Entails were executed long previous to those times.

So that the successor now in enjoyment of the estate cannot let a farm for less than the original rent, without first putting up his farm to public roup?—A possessor of an entailed estate that wishes to lower the rent under those circumstances, cannot do it without displacing the tenant and putting it up to public roup.

Since the statute of 1824, which enables the heir in possession to make a settlement on his wife and children, do you think the heirs in possession have been more disposed to lay out money upon the improvement of their estates?—Not in consequence of the statute: I apprehend there has been very little money laid out by the possessors of entailed estates since that Act passed.

Do not you think that would be the tendency of that Act?—Not in these times, considering the whole of their circumstances.

Do you not think, that as far as that Act goes, it would make the heirs in possession more willing to lay out money in the improvement of their estates than they otherwise would have been?—Decidedly it would, if they had money to lay out in improvement.

You are aware that the Act of 5th Geo. 4. empowers an heir in possession to burthen his estate to the extent of three years income of the estate, as a provision for younger children?—Yes.

Supposing a proprietor having no direct male heirs to which succession his estate was restricted, but having female heirs for whom he wished to provide, would not the effect of that Act be to tempt him to raise the rent of his estate to an unreasonable height, in order to obtain the power of providing a larger sum for them?—His interest would be to raise it to the highest possible sum.

It would be more for his interest in that case to raise his rent, at any expense to

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the estate, in order to make the sum of the three years rent a larger provision for his children, than it would be to continue the rent at a reasonable rate, from a consideration of the circumstances of the estate?—Certainly, if he could do so without an outlay of his own money.

But the circumstance of his raising the rent to a higher amount would give the possessor under that Act, the power of making a larger provision for his children, by making the sum of three years rent as calculated from that time a larger sum?—Certainly.

At the time you have spoken of, thirty years ago, when extensive agricultural improvements were made, were not leases longer than twenty-one years supposed to be legal upon entailed estates?—They were legal where the Entail says nothing to limit them; and I think thirty-one years considered as competent to entailed proprietors: in entails lately made they are restricted.

Then in the district of East Lothian, were a large part of the improvements made in consequence of having long leases granted to the tenants?—I think not, I think that nineteen years leases were mostly in practice in East Lothian at that time upon entailed estates.

With all your feelings as an old landed proprietor, do you conceive that the dignity of the landed gentry of Scotland can be maintained when the properties are under judicial trusts, and two-thirds of the rental appropriated independently of the owner?—It is decidedly impossible.

Supposing that the severity and strictness of the present law of Entail were to be mitigated by any measures, and land of course to come in greater abundance into the market in Scotland, do you conceive that the value of fee-simple property in Scotland would be reduced to any considerable extent?—Not to any considerable extent.

How many years purchase are at present given for free estates in Scotland?—From twenty-seven to thirty years purchase; twenty-seven, I believe, is nearer the present calculation.

Do you consider that a smaller number of years purchase is given for land in Scotland than is given in England?—I am unacquainted with the price of land in England entirely.

Veneris, 21° *die Martii*, 1828.

THOMAS FRANCIS KENNEDY, ESQUIRE,

IN THE CHAIR.

Richard Alexander Oswald, Esquire, again called in; and Examined.

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DOES the possession of entailed lands in Scotland give credit, consequence and influence to the possessor, in proportion to the value of the land so possessed, or to the interest which the possessor, as life-renter, actually has in those lands?—In some degree both; I apprehend it gives him a real interest and credit only equal to his life rent interest in the estate; but in the general circumstances and in the common occurrences of life, it gives him an apparent interest, if I may say so, belonging to the real value of the estate, and consequently puts him in a false position.

Is the value, lost to the possessor from the nature of his right, made up in any way to any other party, or is it lost to society?—I apprehend it is lost to society.

That is to say, the difference of the value of an entailed estate and a fee-simple estate is not made up to any one?—Not made up to any one; I apprehend the restrictions on the property, of whatever value they are, deteriorate it; and that nobody can derive benefit in the same degree as if it were free from these restrictions.

Does the present system of Entail, preserve, or decrease, to the aristocracy and gentry as a body or as individuals, the degree of influence and consideration which the free and unlimited possession of the same estates would confer on them?—I apprehend that it decreases the consequence, and deteriorates the position of the aristocracy

aristocracy in many respects; all that they gain is in the integrity of the land being preserved to a series of heirs, but they lose a great deal to obtain this.

Does it increase, or lessen, the rational probability of their transmitting those advantages to their descendants?—It increases the probability of the land descending perhaps, but not in the degree that is generally imagined. I apprehend, that if the law of Entail was done away altogether, the greater proportion of the estates of the nobility would pass not only with undiminished value, but with added value to their descendants; the certainty would be done away with, but the probability would be, that they would pass undiminished. I would wish to draw a distinction with respect to the position that the Entail places land in: It is supposed to place it beyond the possibility of its being removed by any attack; at the same time it appears to me, that in all public measures the legislature have never paid that attention to the Entail law as to lead one to imagine, that they consider it paramount to the general improvement and value of property in the country. In all cases of public Acts for the public advantage, Road Bills, Canal Bills, and every public Bill provides that the law of Entail shall not stand in the way; therefore it appears to me, that it ought not to stand in the way of the general good of society.

Is the tenure under Entail calculated to produce as good an understanding between the parties connected with, and having transactions in, any way dependent on the restrictions imposed by the Entail?—I think it is not; and I think that therein consists one of the greatest practical evils attending upon Entail.

Have you had any evidence of any tendency in favour of or against such a feeling under your own observation?—Very often and very strong, so much so as to confirm me in the opinion that I have given to the Committee.

Can you speak to its effects of your own knowledge?—In many cases I can; the restrictions imposed by Entail, differing as they do from each other, have placed the proprietor or the possessor of the land in a position with his tenant in which it is nearly impossible to extricate himself, without danger of infringing the Entail, or committing what I conceive to be actual injustice; I have been placed in that situation often. I may state, as an illustration of this, that when a man stands in the difficulty between committing an irritancy in his Entail, and doing that which perhaps he has not engaged, as he could not engage to do, but which he is supposed to have given his sanction to by the tenant, and occasioned an outlay upon the tenants' part, he is precluded from giving the effect that ought in justice to be given to it, upon any change of circumstance affecting the arrangement. Those changes have very often taken place, and have placed all parties in a very awkward situation.

Are you aware of any change in the character of the agricultural population during the progress of the agricultural improvements in Scotland, within the last thirty years?—I think a very great change has taken place, and chiefly within the last ten years; since the reaction after the great stimulus that was given to agricultural improvement.

Do you ascribe any part of such change to the unavoidable effects of the tenure under Entail?—I do, in point of fact; great and perhaps, in point of general opinion, greater than belongs to it; because many circumstances have occurred arising out of Entails, and the peculiar arrangements between the landlord and tenant, which have created a considerable difference of opinion and a considerable difference, even in legal interpretation; out of which have originated many cases which have both made uncertain the nature of those arrangements, and given rise to great difference of opinion between the parties as to where, in point of legal obligation, the burthen ought to fall, or rather as to the proportions of the burthen that ought to be thrown on each party; and have given a strong impression to both parties, that each mutually is wishing to impose too much of the burthen upon the other.

What is the general feeling of the tenantry towards the landed proprietors, as far as your observation has led you to form an opinion?—I think it has very much changed, from these circumstances, within the last few years.

Do you think that a distinction exists in that respect, between the tenantry on lands held under Entail, and lands held in Fee-simple?—Yes, a great difference in point of fact, as far as the position of the parties are different; and that the bad effect produced by the one is more general than the good effect by the other; arising from the transactions under Entails being more fettered, and consequently more complicated and indirect. My great objection to the tenure under Entail is, its leading every thing to be done in an indirect and round-about, instead of a direct and simple manner.

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What do you conceive to be the general feeling of landlords towards their tenantry?—I think, throughout Scotland, the general feeling of landlords towards their tenantry, is much better than their means or circumstances enable them to act upon.

You mean the Committee to understand, that upon entailed properties landlords would generally treat their tenants with much greater liberality than they find themselves in a condition to do?—They are precluded by their situation from treating them with the same liberality that they would otherwise, both in point of inclination and interest, do.

Would a change in the Entail law tend to do away any part of those evils, and do you conceive that it would be acceptable to the parties generally connected with land, and particularly with land held under Entail?—I think it would, for this reason; that it would place all the transactions in one point of view, and that point of view would be distinct. Each party would see his own interest, and also see his duty in a direct point of view.

Have you the means of knowing the sentiments of any considerable proportion of those persons who may be held to be interested in the continuance as it is, or the alteration of the law of Entail?—Partially, and perhaps pretty generally, I have. I have taken part in and heard a great deal of discussion upon the subject, for many years past. I apprehend, that the general impression in Scotland of all parties, particularly those who have given much attention to Entail law is, that in itself it requires alteration and amendment. The opinion as to the precise principle upon which that alteration ought to proceed, or the extent to which it should go, is various; and it is impossible for me to speak upon it more precisely, so various are the opinions entertained with regard to it.

Is this sentiment general in Scotland, or confined to those immediately interested in entailed estates?—General, I think, in Scotland.

Not limited to those who are connected with entailed estates?—Certainly not limited to those; although stronger in both ways, both in approving and in condemning it, as their connection with entailed estates may have led them to take different views upon the subject.

What are the leading reasons assigned by those who disapprove of any change?—It would be difficult to state the whole reasons. It strikes me, that the strong reason of those who are interested in, and are immediately connected with entailed lands is, the feeling in the first place, that they attach in some degree to the nature of the tenure; they have an attachment to what is old and to what they have been accustomed to look up to; and to which they ascribe perhaps a greater degree of consequence, from an undefined notion that it is in some degree exclusive, and at the same time guarded to them by a sort of impossibility to be attacked.

On which side should you say, that the general opinion of landowners in Scotland preponderated; in favour of a change, or against it?—In favour of a change, decidedly in a great proportion.

Is not the desire general and strong in Scotland on the part of men of capital, to acquire land?—I do not think more than in England.

Is there not generally a strong desire on the part of men of capital to acquire land?—Certainly it is a general and common feeling, but I would say that it depends greatly upon the quantity of capital that a man has accumulated. In Scotland men who have acquired a certain degree of capital, and are in the way of accumulating more, are rather desirous to encrease their capital than immediately to invest it in land, still it is with the ultimate view generally in Scotland to vest it in land. I consider that the attachment to landed property is stronger in Scotland than any other country I am acquainted with.

Is not the desire at least equally strong on the part of the possessors of land to retain it?—I believe more so.

Have you ever known the possessor of an unentailed estate submit to great privations and difficulties rather than avail himself of his power of sale?—The very greatest possible, frequently.

Independently of the provisions of 10th George 3, which technical difficulties and doubtful security seem to render inoperative, can an owner under Entail now borrow money for improvements, except at usurious interest on personal security and the extra expense of life insurance?—I apprehend very little money could be raised under that Act, for the purposes of improvement; in other cases, whatever money is borrowed, must be borrowed upon such interest as the life-rent property can afford.

If

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If the heir in possession under Entail, and the next substitute, had the power of borrowing money on heritable security, could they not improve their estates at half the cost, to the great benefit of the public, and to the real advantage of the inheritance?—Certainly they could, provided the heritable security was good against the estate, perhaps even under a certain modification of that, if the heritable security was good against the improvement of the estate, this might be the case, provided you could separate the improved value from the previous value of the estate.

Would not the difference be this, that the substitute joining in raising the money would have a salutary check upon the outlay, and that the difference of the charge would be the difference between annuity interest and legal interest?—The substitute joining in the security would at all times command the money upon better terms than one life-renter; but without you give an absolute security upon the estate independently of both the life-renter and the substitute, it would still not arrive at a good security. It would be better in so far as there would be two parties in it; but without the security is ultimately against the property, which in my apprehension, is at once striking at the root of the Entail, you cannot give a real good security. Nothing short of making entailed estates good against onerous debts, can ever put them upon a footing, for the purpose of improvement, with unentailed land.

From what you have seen of the attachment to land on the part of unentailed proprietors in Scotland, and from what you know of the law of England, which enables in the course of every three generations, every estate to be sold, have you any idea in your mind, that if the law of Entail were prospectively so relaxed as to allow similiar sales in succeeding generations to take place in Scotland, that a large portion of the land under Entail in Scotland would be brought to market?—I think very little of it would be brought to market, but very great improvement would take place upon the land.

Is it your idea to confine the borrowing to sums actually spent upon the improvement of land, or to extend it to general debts?—With respect to the improvement of the land, it would be necessary that there should be a power of borrowing, upon the security of the estate, means sufficient to bring that estate to the degree of improvement that is necessary to bring it to its value.

And not to extend it further?—If the object in contemplation was merely to improve the estate, and if the power of borrowing upon the estate was for the purpose of improvement, nothing further would be required. It is difficult to point out the limitation which is necessary, but if the proprietor at the time had the power of burthening the estate to the extent of the necessary improvement, it would certainly be beneficial to the estate and to the public.

You said that the general feeling in Scotland is in favour of a change in the law of Entail; what did you understand by a change in the law of Entail in that answer?—I meant to say, that the dissatisfaction with the present law was general, although, perhaps, not universal, and that it would give great satisfaction to see a change brought about.

By a change, do you mean a change so as to unentail the property, or a modification of the present law?—I apprehend there are many opinions with regard to that. If my own opinion were asked, I would say, it would be generally acceptable to Scotland if the Entails were done away; even carrying the thing to that extreme, I think it would be more generally satisfactory to Scotland to have the entire system done away than to have it remain as it is.

Do you think that a medium course might possibly be adopted with advantage?—If a medium course can be found that will answer the purpose, I should consider it probably more acceptable to a great majority of Scotland.

Has any difficulty occurred, so far as you know, with men possessed of large funded property, of finding land to purchase in Scotland?—None, but the difficulty of not choosing to give the prices asked.

Have the prices of land in Scotland been generally supposed to be above the value of the land?—The reason I apprehend that the price of land in Scotland is at present kept high, and that no purchases are made, is the great uncertainty that prevails with regard to the value of money, not the value of land.

Can you account for the reason why there has been no public expression of the general dissatisfaction which you have stated to exist with the state of the law of Entail?—I am not aware of any public opportunities that the population of Scotland have had of expressing it.

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You are aware that previous to the passing of the 10 George 3. there were public meetings of various bodies, the faculty of advocates, the writers to the signet, and the convention of burghs remonstrating upon the state of the law; how is it that none of those lawyers and gentlemen remonstrate now?—I apprehend that matters of perhaps greater moment have been much more pressed upon the public attention within the last twenty years; and that such a matter as this, in which individuals were only concerned, has not been brought forward so much to notice; but I apprehend the present circumstances of the entailed proprietors of Scotland will induce them at last to draw as much of the public attention to the subject as they can; and if the sentiments of those bodies are taken upon it, I apprehend it will be found that in general they will concur in the opinion that some change is necessary.

Has there not been a committee sitting in Edinburgh upon this subject, of gentlemen connected with entailed estates?—I believe there has been such a committee; when I was in Edinburgh about a year ago it was proposed, but it was rather brought together upon the suggestion of a few individuals, than matured. I did attend that meeting, but nothing at the time seemed to me to be done, at least for the few minutes that I was there they did not come to any point as to what they were to do.

That committee have subsequently made a report, have they not?—I have not been in Scotland since, and am not aware of their proceedings.

Did it appear to exite any general attention at the meeting at which you were present?—The meeting was called, as I heard, rather upon a particular view of the case as it affected the superiorities, and I did not consider that the thing was at all matured, and I did not continue at the meeting.

Are you aware whether the intention to take the thing into consideration has been generally known in Scotland, in sufficient time to enable the great bodies to express any opinion?—I apprehend, that if the thing goes on as at present, and is brought under the discussion of the legislature, the feelings of all parties will be more distinctly made known than they have been; and I apprehend that a part of the apathy that has been shown upon the business, has been from their waiting in expectation of the question being put in motion.

Are the evils, in so far as regards the management of entailed estates, equally observable in those estates, the proprietors of which are in easy circumstances, as in those where they are in difficulties?—The existence of the evil, I apprehend to be the same; it is not obtruded upon persons in easy circumstances in the same degree as upon others.

Is it equally observable upon the face of the estate?—I do not know that it at all depends upon the circumstances of the proprietor, because many proprietors, to my knowledge in perfectly easy circumstances, have not chosen to lay out money upon entailed estates, not considering that it was a good mode of laying out money. I can state a very strong instance of that, which will occur to many gentlemen. Look at the late Duke of Queensberry's estates, he was in easy circumstances, but at the time of his death the estates were in a very bad condition; they are now going through great improvement.

Do these observations apply to the management of the Buccleugh estate?—My answer applies to the Queensberry estate since it came into the Buccleugh possession?

Are you acquainted with the management of the Gordon estates?—I am not acquainted with that part of Scotland.

Are you acquainted with the management of the Stafford estates in Sutherland?—Not except from hearsay.

Are you acquainted with many cases where proprietors of entailed estates in prosperous circumstances, and in full enjoyment of the rents of the estate, are anxious for a change in the law of Entail?—I do not recollect any proprietor of any estate of any extent in Scotland under Entail, of my own acquaintance, that to the best of my knowledge would not be inclined to see a change in the law; there may be such individuals.

Do you mean a change to the effect of disentailing the land?—I have not said so.

You said that a proprietor of an estate often could not do things for the benefit of his tenant, in the fear that he might commit an irritancy; could you give any instance of such a case as that?—The circumstance I allude to is this, that a proprietor

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proprietor of an entailed estate, who had entered into possession before the general change of value took place, suppose he had made an arrangement with a tenant to take a farm for a certain period, he making a certain proportion of outlay and the tenant to do certain things, and this had gone on and a lease had been entered into; suppose the change that has taken place to occur, and that the tenant says, "I cannot go on with the proposed plans I had formed, and which we had agreed upon; and more than that, I must commence a system to take out as quickly as I can what I have put into the farm, otherwise I cannot pay your rent;" under such circumstances a landlord having the fee-simple of his estate, could make what arrangements he pleased. On my estate I can do no such thing; I cannot alter the circumstances of the lease, without putting the tenant out and setting the farm to the person that shall bid most at public roup for that farm.

That arises from the nature of the Entail under which you hold?—It is a very common clause in Scotch Entails.

Does your Entail specify any particular lease that can be granted?—Yes; not beyond nineteen years, except under particular circumstances. These clauses are apt to occasion things being done indirectly which could not be done directly. Under these circumstances I have known often a tenant not take a lease, but continue to possess his farm upon what we call a missive, which is a letter obliging yourself to grant a lease when demanded; but the Committee are aware of the position of the tenant holding that document in case of the proprietor dying.

Consequently, if the proprietor be old or in bad health, no tenant dare venture to make any outlay or permanent improvement under such a missive?—The tenant must have a personal confidence in his landlord, and also a reasonable expectation that he is a good life, otherwise he would not do so.

You stated that if Entails were maintained, a great advantage to the property might be obtained by allowing the heir of Entail in possession to burthen the estate directly for such improvements as he might think it judicious to make; can you see any means by which what might be called judicious and fair improvements could be ascertained beforehand, so as to make them a just burthen upon the substitute heir?—Different schemes have been suggested to me, and some have occurred to myself, but the machinery of the whole turns upon this pivot, that there must be ultimately a valid security upon the estate to some extent; now that valid security is in direct contradiction to the principle of Entail, and there appears to me a difficulty in devising any measure that does not affect in some degree the principle of Entail.

Are you aware what is the common price of land in Scotland?—It varies; I believe that at present the usual price in the part of the country I am most acquainted with in making up rentals for judicial sale, is to take it sometimes as high as thirty but generally twenty-seven years purchase at the present time; and then if it does not sell at that, and there is a necessity of selling, the exposer goes down in his price, and consequently in his rate of value; but twenty-seven years I should name as the present value.

You are not aware, from your experience, that it is often sold as low as twenty-four years purchase?—I have not known any land sold as low as twenty-four years purchase for many years.

Is not the price of land at present in Scotland much lower than it was twelve or fifteen years ago?—I apprehend it is; but that arises from the difference in the value of money.

Is not the number of years purchase different?—Perhaps it may be; but the great difference is owing to the difference of the value of money.

Have not the rents of land fluctuated very much in Scotland?—It is impossible to say what the rent of land is at present.

Are not many farms declining in rent?—There are no farms that were let in the high times, under common circumstances, that are now paying the rent they were let at.

That state of things must of course affect the price of land?—Certainly when I speak of the number of years purchase, I speak of the rent they are actually paying, not at what they may stand in the rental.

Had you ever occasion to apply for what is called an Estate or Special Act?—I have not made any such application for myself; I have known many made, and have been called as a party in the Entail of different estates.

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Are you acquainted with the proceedings which attend such applications?—In some degree I have been called upon to take a part in them.

Do you know whether it is generally found to be attended with great difficulty?—It depends much upon the nature of the purpose for which the Act is wanted; it is attended with considerable difficulty, and considerable expense, in all cases

What are the most common objects of those special Acts?—I do not know that I can answer that question generally; to clear away some difficulty, about which there is an uncertainty how far the estate is engaged or is liable.

Are they generally for the purpose of determining some uncertainty rather than for the purpose of altering anything in the terms of the Entail?—I should say they were generally to bring about a settled interpretation of some disputed point.

Are you aware whether the expense of such an Act is very great?—It depends upon the number of parties that are to be called, in some degree; I have heard the expense stated to be never lower than from seven hundred to one thousand pounds; and I have known it to be from twelve hundred pounds to near two thousand pounds arising from those causes.

Do you apprehend there is any case of obtaining an Estate Act where there are not disputed fetters of an Entail?—I have not heard of any such.

Therefore it is merely when there is an imperfect power of liability for debt, or some disputed point to be ascertained, that it is possible to obtain an Act of Parliament?—Yes; I have been advised to apply for an Estate Act to explain an inaccuracy in the deed of Entail, which the legal gentlemen differ in opinion upon. If I were to use my own words, I should say it is to put into common sense what is absolute nonsense.

If a power were given freed from the technicalities of 10 Geo. 3, for the proprietor of an entailed estate to charge or sell a certain portion of his land for improvement, do you think that would answer the purpose?—If such a proportion could be set aside as was sufficient for the circumstances of the estate, I apprehend it would answer all the purposes of improvement; and if such a power was to be extended, so as to have an effect backwards upon improvements already made, it would answer all the purposes of giving the relief that would in justice be required, but I see difficulty in doing it.

Do you apprehend, from your knowledge of the management of landed property, that it would be possible to fix any precise portion of the value of an estate which it might be expedient to subject to such burthens for its improvement?—If a mode could be devised I think it is not impossible.

You stated, that not availing yourself of the provisions of 10 Geo. 3, you had expended a large sum in the improvement of a strictly entailed estate; independently of the terms upon which money might be raised for that purpose, has the outlay been very productive generally in your own particular case?—I mentioned my own particular case merely for the purpose of illustration; but I mentioned that I had laid out a large sum without availing myself of the provisions of the Act. It arose from the peculiar circumstance, that part of the money was held in trust to be vested in land; and under the terms of the trust, it was conceived by the legal gentlemen to whom the trust was submitted, to bear a construction that would authorise laying out part of the money upon the land already purchased, which was afterwards found to be erroneous; and in consequence of that I had laid out a large sum, conceiving that I had power over the trust money, which I afterwards found I had to repay. But I have no hesitation to say, that I consider that money was beneficially laid out, and that it has increased the value of the estate more than if it had been laid out in the purchase of land at that time.

Then the fee simple value of your estate, in your judgment, is improved to an extent more than equivalent to the burthen cast upon it?—I should say, that I consider the fee simple and actual value of my estate to be increased in the full proportion of all I have laid out, for the purpose of agricultural improvement, in my estate.

Have you, by your outlays, conferred a vast additional value on your estate?—I think, allowing for the difference between the present time and the time at which I received it in 1792 and 1793, the rental has doubled in consequence of the outlay upon the estate; it is nearly doubled still, taking it at the rent that it presently pays.

You mean, according to the present price of agricultural produce, and the present value of money?—The rent paid last year upon the estate, was not much under double what it was in 1794.

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Is there not a distinction to be taken between the increase of money rent, and the increase of produce, in comparing the present time and the time at which you entered upon your estate?—There certainly is, but I have spoken hitherto of money rent. If I were to speak of the increase of productive power upon the improvement of lands in Scotland, I should not hesitate to say that the productive power has increased many times over upon the improved part of Scotland, since that time.

Must not your life interest in that estate bear the whole burthen of the expense necessary to produce such increase of value as you have conferred upon it, under the existing law of Entail?—The whole, except such part as I brought under the Act of 10 Geo. 3. after I had made that outlay.

And what you did impose upon it, under 10 Geo. 3. is only a small portion of that which you had beneficially expended?—A very small portion, less than one-fifth.

If you were permitted to burthen or sell a portion of your estate, equal to a part of the sum which you have expended on the improvement of it, would your estate descend to your heir, of much greater value than it was when you succeeded to it?—It will descend, independently of any arrangement that may be made, of more than four times the value in productive power.

What would have been the condition of your estate now, if you had endeavoured to extract from it as much as you could during life, and had abstained from every possible outlay upon it?—If I am to judge by property of a similar description, and under similar circumstances, that has been so managed, I would say, that it would not let at a higher rental, at the present day, than it did then generally.

Do you know any properties in that neighbourhood, in such a situation?—I do, several.

Supposing that you had a power, under the law, to throw the whole burthen of the money you laid out upon your estate, upon that estate, do you think that your heir would have been benefited by the whole improvement you have made upon that estate, notwithstanding the increase of the burthen?—Under those circumstances, I should not have gone on to the extent that I did; but I believe that the greatest proportion of what I have laid out has been beneficially laid out for the next substitute in the entail.

Then supposing your estate had not been entailed, and you had the power of throwing the whole burthen of that improvement upon the estate, you would not have thought it right to have transmitted the whole extent of the burthen to your successors?—I would not have transmitted the whole extent of that burthen, but that arose from peculiar circumstances; I should have retained the right.

When you talk of doing away with Entails, do you apply your observation to the limitation of Entails, or to absolutely abolishing them?—When I have talked of doing away Entails, I have talked of it as an extreme case in contradistinction to the present state of things.

Do you not conceive that it is very possible to devise some relaxation of the principle of Entails, so that all the reasonable purposes of Entail to prevent dilapidation of the property, may be preserved, and yet that individuals possessing entailed estates may not be subjected to the tyranny of such a law as that which now exists?—I should conceive it perfectly possible; it might be difficult in its arrangement perhaps to make it work well, but I should conceive it would not be satisfactory to Scotland in general if the Entail law was to remain in principle what it is now, because I apprehend it does away with one of the best attributes of property, which is lost to the possessor of entailed land, and lost to the public; and there is no return for that loss to any body; it in fact annihilates the best attribute of property.

Have you ever considered the Entail law of England as a medium between the two extremes of interminable power of Entail, and such direct ownership as enables each possessor to part with the fee?—If such a modification could be brought about, or if it could be engrafted upon the Scotch law so as to be brought to act, I should think it a great improvement; I am not competent to speak of the whole English law of Entail.

Upon the whole does it appear to you, that such middle course would be more expedient than any other that has occurred to you?—I should think so, certainly; and more satisfactory to all parties.

You have stated, that you should have been unwilling, in case your estate had not been entailed, to transmit the whole burthen of the improvement you made to your

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successors; supposing your estate were disentailed directly, what would be you mode of proceeding with respect to the burthen as it now exists?—I should leave no burthen upon the estate that I could possibly avoid; and the burthen I should leave would be small.

How would the disentailing of your estate enable you to relieve yourself from the existing burthen?—It would enable me to relieve myself of the whole difference between paying twelve per cent, and giving security upon the estate and paying five per cent; and it would enable me to do away entirely with any burthen that could affect the estate, besides it would do what I consider a matter of considerable consequence even to the aristocracy who have so great a regard for the law of Entail; it would place me in a comfortable situation. The moment the proprietor of an entailed estate is at all in pecuniary difficulties, in order to make the best security he can under the law of Entail, he must pass the estate out of his own hands into the hands of a third party, on purpose that the security may be out of the reach of being defeated.

And *pro tanto* he relinquishes the management of his own property?—He relinquishes the property; a title must be made in another.

Is it possible that an estate can be managed advantageously in such a position?—It is next to impossible, for this reason, that the remote and ultimate interest must give place to the immediate demand upon the estate.

Must not the ultimate interest and the immediate interest be directly at variance in almost all cases inScotland, from the circumstance that the improvements have only lately began?—Certainly.

Then the primary and the immediate interest is the interest of the creditor, and the remote interest is the interest of the heirs; and the remote interest of the heirs is sacrificed to the immediate interest of the creditors in almost all cases?—It is.

Mr. *Alexander M'Neil,* called in; and Examined.

Mr. *Alexander M'Neil.*

DO you conduct the affairs of the British Linen Banking Company at Stranraer, in Scotland?—I do.

During what period have you resided in that capacity at Stranraer?—I have resided at Stranraer for upwards of thirty years, but I have been only agent to the British Linen Company about five years, previous to that I was an agent and attorney at Stranraer.

During the period you have resided at Stranraer, has your attention been called to the state of property in the county of Wigton generally?—It has a good deal.

Is there a large portion of that county under Entail?—A very large portion of it. If an account was taken of the proportion, I believe it would turn out that about seven-tenths of the whole county of Wigton are entailed.

Is much of that recently entailed?—A good deal.

Have you had occasion to form an opinion, in the general acquaintance with property which you have derived from your business, as to the general tendency of the Entail law upon property?—We have a very general opinion in Wigtonshire, that the Entail law is hurtful to society; it takes away from the heir in possession all control over the future destiny of the estate, and deprives him of the means and motives for permanent improvement.

Do you think that this impression is justified by the visible appearance of entailed property in your district?—I think it is; there are some exceptions in Wigtonshire, but those exceptions generally apply to Entails recently made. My observation has led me to see that the possessors of property lately entailed, take a deeper interest in the estate than the more remote successors. I have observed that the father who has entailed, and the son who succeeds him, have paid more attention to improving the estate than the more remote heirs; and that applies in some instances in Galloway.

Are you not aware that an Act of Parliament exists, dated in the year 1770, by which heirs of Entail may provide the means of carrying on improvements upon their estate?—I am aware of that Act, but I have not found that heirs of Entail have provided the means of carrying on improvements from it. I have never found that any men of capital would advance money upon such a security. There is one hardship in the very threshold of it, that the money must be laid out upon the estate in the first place, before you can make a credit. Now where is the heir of

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Entail to get the money; the money must be expended and the vouchers recorded before any security could be given.

Do you know any instances either in the county of Wigton or adjacent county, where a contrast has appeared between the condition of entailed and that of unentailed property?—I do, both in Wigtonshire and in the neighbouring counties.

Can you state any details that will illustrate your views?—I know of one estate that was recently sold by Act of Parliament; previous to its being sold it lay at a distance from the residence of the proprietor, and it was very much neglected; it was in the most barbarous condition of any estate I ever saw, considering its capabilities. It was afterwards sold, and lots were purchased by different people, and a great deal of money expended in its improvement; and now the parish has become a considerable exporting parish of produce. There is one exception of a lot that was bought and added to an Entail; nothing has been laid out upon that lot.

Were you yourself purchaser of part of that estate?—I was.

In what condition did you find the property when you purchased it?—I found the best holm land in it feeding goats; land upon which I have since raised sixty bushels of wheat to the acre.

In what condition is that portion of the property which has since been subjected to another Entail?—It is just in the condition which it was before the sale.

Do you apprehend, that from the general administration of the estate to which it is attached, it is likely in the course of a reasonable time to undergo suitable improvement?—I do not think it is likely.

Has there been any liberal system of outlay upon those portions of that entailed estate where you may suppose that the proprietor has had time to proceed to a system of judicious improvement?—No; there has not.

What was the price of the whole estate which was sold?—I fancy it was about 140,000 *l.*

Did the proprietor reside upon the estate?—The proprietor resided at a distance from it.

At what distance did the proprietor reside?—I think about fourteen or sixteen miles.

Was the portion that has been since entailed, bought by a person who had other large estates?—It was.

Was that the case with the other portions that were unentailed?—It was not.

What was the situation of the entailed part with reference to that of the unentailed portion; was it in a higher situation?—Part of it; but the portion of it that I speak of, is in fully as good a situation for tillage and for agriculture as the other lots. There is a part of the purchase that has been entailed that was not susceptible of much improvement, and I do not allude to that part.

Is the residence of that entailed proprietor that purchased a portion of that estate, at a distance from that portion that he purchased?—The entailed proprietor does not live in Scotland at all.

Is the original portion of his entailed estate under the same system of management as this portion he purchased?—The whole estate is under the same system of management; and there is little outlay for accommodations to tenants.

Have you known the Corsall estate?—Yes.

Did you know it while it was attached to the Galloway property, before it was severed from it, and since it was so severed?—I did.

What has been the effect of the change upon the estate?—It has had very little effect upon the estate, except that the proprietor has planted and lives there; previous to that there was no person living there. It is entailed by the purchaser.

Therefore on the cultivation of that estate no effect was produced by the sale that took place about seven or eight years ago?—No; the estate is worse than it was once, but I ascribe that to the circumstances of the country. I am not aware that the proprietor has thrown any impediment in the way of the improvement of his estate, on the contrary, I believe he has been very attentive to it.

Are you aware whether that estate was purchased subject to life leases?—I am aware that it was, part of it; not all, but a considerable portion of it.

Are those leases still subsisting?—Some of them; and some, I think, are not subsisting.

Where those leases have fallen in, has any improved culture taken place?—Not that I am aware of; it was rather a well-cultivated district before the sale, perhaps as forward as in any part of Wigtonshire.

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Have you had occasion to know any thing of the circumstances of the Sheucan case?—Yes, we have known a great deal about that in our district.

In what way were you made aware of the bearings of that case?—I was one of the purchasers of a small lot of the land, and lost it.

Be so good as state the circumstances which led to your knowledge of the case, and what the effects have been in your own case?—According to my recollection, the estate was found chargeable, in the year 1784, with certain debts, by the unanimous judgment of the court of Session; and this judgment was held by the judges and lawyers in Scotland to be good law, for thirty-eight years. At the end of that period, the House of Lords gave the law a different interpretation from what both the Scotch lawyers and judges had given; and in consequence of that, and some informalities that were said to be found in the proceedings, which informalities the Scotch judges did not think important, and doubted if they existed, yet the House of Lords found that the sales were all bad, and ordered the lands to be restored to the Entail. One of the lots of that estate was resold to a number of people about Stranraer, who invested the fruits of their industry in little lots in the neighbourhood, among whom I was one. After the sale we all set to, and improved it to the best of our abilities, and now we have lost the whole, improvements and all.

Did you not receive back the purchase-money you paid?—No.

Then you lost the price of the land, and whatever you had expended upon the improvement of the land?—We lost the price of the land, and whatever we had expended upon its improvement. We have a claim against the trust, but we are not at all sanguine of success.

Has not that decision in the Sheuchan case, coupled with the recent decisions respecting grassums, and the power of granting long leases, brought the utmost possible confusion into the law of Entail in Scotland?—It has; and I am satisfied, since I came to London, that those decisions have prevented men of capital from investing their money in purchasing land in Scotland. I have met with more than one individual, who has told me that he has his money lying unemployed, and that he will not at present invest it in the public funds, and he would be anxious to buy land in Scotland, but that he is under the impression that the Scotch lawyers cannot make out a sufficient title.

Do you apprehend that it is more difficult to make out a title to an estate in Scotland than it is in England?—I am not aware of the law in England, but I have met with more than one individual who has stated that to me, as the reason he would not invest money in land in Scotland.

Not even in land that is not entailed?—The people I met with, were not legal people; they may have a confusion of ideas about the distinction. I told them there was plenty of land unentailed; and they said the Scotch lawyers had got into so much confusion about it, that they could not trust any of them.

Then do you consider that the uncertain state of the law with reference to Entails, produces evil consequences to the public in general?—I am quite satisfied of that.

Do you consider that it also produces great inconvenience and evil to individuals?—I am quite satisfied of that.

Do you think that the state of that law consequently calls for the consideration of the legislature?—So it appears to me.

Do you consider that some measure, modifying or relaxing the present law of Entail in Scotland, would be generally acceptable in that country?—I am not aware how the entailed proprietors would feel upon it, but I know that other people would be very glad to see a change in the law.

What is the rate of purchase at which land, you are acquainted with, has been sold?—From twenty-four to thirty years purchase.

Have you known much land sold as low as twenty-four years purchase?—I know an estate just now in the market, that has been set up at twenty-four years purchase, without an offerer, and they have now reduced it to twenty-two years purchase.

Is that a considerable estate?—They expected about 8,000 *l.* for it.

Is that a nominal rental or a real rental?—A real rental; no purchaser will buy upon a nominal rental.

Is it a well paid rental?—I should suppose so. No purchaser would give even twenty-four years purchase, unless he was satisfied that he was to get a well paid rental.

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Do you recollect what the number of years purchase was upon the Ballintrae estate, to the sale of which you have adverted?—I do not recollect; the rents were so low that we were not guided by the number of years purchase at all, we rather judged from the capability of the estate.

Was not the Penningham estate sold in that county lately?—It was.

At how many years purchase?—I cannot say.

Should you say that the average rate is twenty-seven or twenty-eight years purchase?—I should scarcely think it is so much.

Recalling your recollection to the sale of the Penningham estate, are not you aware that it exceeded twenty-seven years purchase upon a well paid rent?—Yes; but I presume they calculated upon a considerable advance. There were some life-rent leases.

Has the selling price of land fallen much in that country lately?—It has, very considerably, because the rent has fallen.

Has it fallen in proportion to the rent?—At one time it did not, but it has now come down in proportion to the rent.

Has there been much land in the market for sale?—There is not much; and from the extent of Entails there cannot be much in our county.

You have been for some years past in a situation to observe the state of the market for land in Scotland?—My observation has been limited chiefly to my own district.

From any thing that has come to your knowledge, should you be inclined to say there was a scarcity of land for purchasers?—No, I would not say that.

Observing the great quantity of entailed land in your county, how do you account for the low price at which the estate you have mentioned, is in the market?—I cannot account for it, except the observation I lately made about finding people in London that would not send their money to Scotland, applies to it; for I was recommending to a gentleman, who told me he had money laying with his banker unemployed, to come and buy it; and his answer was, that he would not do it, because the Scotch lawyers could not make him a sufficient title.

Has that estate ever been entailed?—No.

You are not much acquainted with the condition of entailed estates out of the particular district you have mentioned?—Not much.

You cannot say whether it is generally the case, that you may distinguish between entailed and unentailed properties, by the state of improvement in which they are?—It is a common remark in Scotland, that you may do it; and so far as my observation goes, I think it is well founded in general.

May the lowness of the price of land in your county, in some measure, be accounted for by its being difficult of access from the populous districts of Scotland, in consequence of there being very bad roads to it?—The road to Glasgow is exceedingly bad; and I know that that has been an impediment to the purchase of land in Wigtonshire.

Is not the road from Ayr to Stranraer so bad, that the post cannot be conveyed except on horseback?—It is so bad, and I know it very well, because I generally, when I am at home, travel it once a week.

Would not that affect the rent of the land equally with the price?—I presume it would in a small degree.

James Loch, Esquire, a Member of the Committee, Examined.

James Loch, Esq.

THE Committee understand that you are almost equally conversant with the law of Entail in Scotland and in England, and with the management of estates under those different systems of law?—I happen to belong to the bars of both countries, but I am more conversant with the law of England than with the law of Scotland; and I am not ignorant of the law of Scotland. I believe as to the management of estates, I am equally conversant as to their management in both countries, in which my professional pursuits have given me considerable experience.

Does your experience of estates, under Entails in Scotland, lead you to the conclusion, that they are favourable or unfavourable to the improvement and good management of property?—I should say they were not favourable; at the same time, I think there are many circumstances that have taken place in the state of the country, that have made them much less unfavourable than they otherwise would have been. One circumstance particularly is, that the rapid rise of rents has induced

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duced a great improvement all over the country, by producing great facilities in obtaining credit both to landlords and tenants, whereby both classes indulged deeply in agricultural speculation of every sort, which would not have taken place if that had not happened. I should fear, however, from what I have seen, (and I have attended particularly to it) that the fall of rents will affect entailed estates very seriously, and more so than fee-simple estates.

Viewing the statute of 1685 in conjunction with the Entail Act of the 10th Geo. 3. and Lord Aberdeen's Act, have you any doubt, considering the probability that the last of those statutes at all events will be exercised to its full extent by heirs in possession, that those statutes conjointly tend to destroy the interest of the substitute heirs of Entail?—I have no doubt that the effect of the statute of 1770 and Lord Aberdeen's Act, but more especially the latter, will most materially affect and most injuriously affect the interest of all future substitute heirs of Entail in Scotland, and of course it must affect the state of property in Scotland under the fetters of Entail.

Does it appear to you a fair provision, that the heir in possession should avail himself of a power, giving him a complete command over-two-thirds of the fee, without any reference to the effect which such power will have upon the subsequent heirs of Entail under the statute of 1685?—Certainly: viewing that Act with the eyes of an English lawyer, and thinking that nothing can be more perfect than the mode of settlement in England, barring some modes of carrying it into effect, I do consider Lord Aberdeen's Act a most unjust and impolitic Act.

Although Entails may have the effect of stimulating the industry of the entailer, is it your opinion that they have a similar effect upon subsequent heirs of Entail, or that they do not rather exempt subsequent heirs of Entail from all such motives?—The more you limit a man's means the less he can do: I take it that is precisely the manner in which Lord Aberdeen's Act must affect all entailed properties. The future substitutes succeeding to a burthened entailed estate, can neither have the means or any inducement to improve.

Is it your opinion that the Entail law of England observes the just medium between interminable powers of Entail, and the power of bringing land perpetually into the market?—It does appear to me that nothing can be better contrived for all purposes of society than the English Law of Entail. It holds out a sufficient inducement to a person who is the maker of his own fortune, to invest his money in the purchase of land, as it enables him to settle it to that degree, for the purpose of founding a family, which is not hurtful to the country, while at the same time it affords fit opportunities from time to time to certain branches of the same family of disentailing the land (to use a Scotch phrase) and of making new settlements, so as to meet the peculiar circumstances of the family at the time. The consequence of which has been certainly, so far as my observation goes, that it has preserved for a greater length of time, in the great families of England and middle classes of the community, their estates perfect and unimpaired.

Has it ever occurred to you, from your knowledge of both systems of law, that an adaptation of the law of England to the law of Scotland might be practicable?—In answering that question there are many difficulties; if I were to confine my answer to a prospective measure, I should say without hesitation, Yes; at the same time if I were to extend my answer to Entails at present in existence, I confess that I have thought much of it, and I can see considerable difficulty in making an arrangement that might suit both the interests of those now in possession and those that come after them. At the same time I do not think the difficulties are such that might not be overcome with some pains and much caution.

Of course you have read attentively the draft of a bill prepared by the Faculty of Advocates in 1764?—I have read it, but its provisions are not so fresh in my memory that I should like to make any observations upon it. In considering this subject, it appears to me that in any prospective measure it would be better to make the Act of 1685 the foundation of such new measure, preserving its provisions but limiting the duration of Entails to be made under it, rather than to enact a total repeal of it, as this bill before us proposes to do. This would be more simple as well as more congenial to the existing habits of the country and of the profession.

Can you see any thing unjust or impolitic in a prospective and retrospective action, founded entirely upon the principle of the law of Entail in England; the prospective action of which is that a party wishing to entail, should have the power

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of entailing on any number of existing lives, and twenty-one years beyond it; and the retrospective action is, that all Entails now in existence should endure for the lives of all heirs now living, and twenty-one years beyond that time?—As to the prospective measure, I have no hesitation; and I think it might easily be accomplished, provided the term of twenty-one years should be a term contingent upon the eldest tenant in tail coming of age, and not an absolute term. I should explain that a tenant for life in England, resembles closely an heir of Entail in possession in Scotland. A tenant in tail in England bears little resemblance to any substitute of a Scotch Entail, but that of the last substitute of the Entail.

What is your opinion with regard to the retrospective action, proceeding upon the same principles?—I think that is made up of so many considerations and feelings that bear upon the point, that I am not sure that the same observation applies without limitation to it, that applies to the prospective measure. I am not sure, however, whether a great part of that is not feeling and not founded in an absolute distinction between the respective merits of the two considerations.

From your acquaintance with the feelings of landed proprietors both in Scotland and in England, whether under Entail or not under Entail, have you arrived at any conclusion with respect to the general wish entertained by them to preserve unbroken their hereditary patrimony; and what is the feeling of Scotland on the subject of the present inquiry, as connected with this feeling?—I have no hesitation in saying, that in England the general desire is to preserve the estate in their families; and that they generally do adopt the wisest measures for that purpose; of course there are occasional instances to the contrary. In Scotland, I believe, the feeling is the same; but there entailed proprietors have not power to take any step to improve their condition. On the same point I should say, that just now the feeling regarding the subject of the present inquiry, is a very indefinite one. I think there is a great desire that something should be done; but I think further, that every person has a case of his own and hardship; and he wishes for a measure to meet that case and to alleviate that hardship.

Admitting that an heir in possession under strict Entail, can only borrow money for the improvement of his estate, at what is virtually a usurious interest, from his inability to avail himself of the provisions of the statute of 10 Geo. 3. is it not a very natural desire on his part to wish to be able to raise money at the rate of legal interest, for the purpose of making improvements, without the remotest intention of selling any portion of his estate?—Undoubtedly; I think the chance or indeed the certainty is, that if the heir of Entail in Scotland has the means of obtaining money at legal interest, it would tend to preserve the estate and not to dilapidate it; because I know, that it is the case in this country that by enabling the tenant for life, with the concurrence of the tenant in tail, to charge the estate, their great object is to keep the estate entire; and they are enabled to do so by getting money at legal interest and under it; that is to say, at five per cent and under; and in fact, I consider that the law of Entail, as it is administered in England, tends to preserve the aristocracy of the country in a far better degree than the strict Entail in Scotland. I have no hesitation in saying, that my experience has brought me to that distinct conclusion. But at the same time it must be recollected, that tenants for life in England are forced commonly to adopt the same means of raising money at annuity interest that heirs of Entail in Scotland generally are; and that they are not always relieved from such difficulties by the tenants in tail acquiescing in any arrangement, such as I have alluded to; and which in fact, can only by possibility happen when the tenant in tail is next in remainder to the tenant for life in possession.

Have the facilities given to such charges led to the improvement of estates, and not to the sale of them?—There cannot be a doubt of that.

Can you see any good reason why, with similar powers and under a similar law, similar results should not be produced in Scotland?—I should say, certainly not; but, as I stated before, there is a considerable degree of feeling connected with a retrospective measure mixed up in that question, which perhaps prevents one from coming so readily to the same conclusion, though I cannot say, that that position is not perfectly correct.

On comparing the feelings of the English aristocracy and of the Scotch aristocracy, have you ever observed any less degree of attachment on the part of the Scotch aristocracy to their native estates than on the part of the English aristocracy?—The feeling I want to describe, is not a less feeling to preserve the estate in the

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family, but a feeling of not wishing to alter that which is established, in the fear that such a change might lead to the destruction of the estate and the ruin of the family; but this feeling prevails most strongly in the minds of the more remote substitutes, who would have every thing to lose and nothing to gain from the adoption of this measure. However remote their chance of succession may be, still it is a chance they are not willing to give up, and sometimes very remote substitutes succeed.

Have you not known possessors of landed property in Scotland struggling with the extreme of difficulty, contrary even to the advice of competent judges, rather than release themselves from those difficulties, by a sale of their land?—In many instances.

That can therefore only be ascribed to a strong inherent love of their native property?—Certainly.

Do you not believe that the attachment is, generally speaking, in this country so strong as to supersede the necessity of any law prohibiting sales of land?—I am not quite sure that I can go to that extent.

Does it not approach to that?—There is certainly a strong feeling in favour of possessing landed property; but at the same time if it was always to be vested in fee-simple in the hands of a young man who has strong passions to spend it, I should be afraid of the consequences, unless there was some limited measure provided, such as the English law of Settlement.

The question has reference to the law of England, which is lax as compared with the unrestricted law of Entail which exists in Scotland?—I should not say that it is more lax than the law of 1685 in practice. In practice it is as strict, generally speaking; because in the relative position in which the tenant in tail and the tenant for life are placed in England, the strong motive it affords to preserve the family property is such, that it has had the effect of keeping property in families in England to a greater extent and longer than in Scotland.

Are the Committee right in supposing that the result of your experience is, that the feeling of landholders in England, is concurrent with the state of the law; and that the feeling of the landed proprietors under Entail in Scotland, is equally concurrent?—Certainly not, it is less concurrent in Scotland a great deal; at the same time I think there is a strong prejudice on the part of many landed proprietors in Scotland in favour of Entails as they are at present constituted.

What is the general result of your acquaintance with the feelings of Scotch proprietors as to any change; first of all only prospective, and further both prospective and retrospective in the state of the law?—I think it is decidedly in favour of some prospective msasure, and decidedly also in favour of any measure that would relieve them from those difficulties, which more or less press upon almost every heir of Entail in Scotland; such as a measure that would enable them to discharge their estates of those incumbrances with which they stand charged, whether arising in ene way or another; such also as a measure that would enable them by means of some proceeding in the court of Session, to charge their estates with a portion of the expense of those improvements, which they have been unable to do in consequence of the technicalities of the 10th of George 3.; and lastly, of any measure that would confer on them more distinct and ample powers of exchange and of leasing, and various other facilities of that sort. At the same time, I believe, as far as my experience has gone, there are many persons who would wish to see the law of the two countries brought as near together as the principles of the two laws would admit.

Is there any thing in the general principle of the law of Scotland incompatible in your opinion, with the introduction of a system of Entails such as exists in England?—I can see none; but in answering that question, I should be sorry to have my opinion taken as the opinion of one who can see all the difficulties that a Scotch lawyer might see; but I should say that there is nothing which a Scotch conveyancer could not meet.

Has your experience led you to see, in the management of Scotch estates under strict Entail, the greatest inconvenience to arise from the fetters of Entail?—I may say that I have; I am at the present moment the sole trustee upon a very considerable Scotch estate, and in the administration of that I have experienced the greatest possible difficulties; they have generally resulted in arrangements with the tenants

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to carry on the improvements that were necessary. In order to effect them, I was under the necessity of incurring considerable personal responsibility, from the inadequate means the law provides for effecting such improvements.

Under the decisions of the courts of law upon the statute of 10th Geo. 3. as affecting securities and the technical difficulties of carrying that Act into execution, is it operative for the purpose of raising money for carrying on improvements?—Certainly not; because, as was stated to the Committee, the money must be expended before you can make it a charge; and the way in which this has been attempted to be done, has been generally that which was pursued in the case I allude to; that is, the money was expended by the heir in possession, or rather by him and the tenants jointly; the latter being allowed an annual deduction from the stipulated rent, for a certain number of years; but it is obvious, that if the heir in possession had died, the substitute succeeding might have refused to make that allowance, leaving the tenant to his remedy against the personal representative of his predecessor. An attempt was then made to make such outlay a charge in order to provide portions for the younger children. It did happen, that though the conduct of the affair was given to a person of some eminence accustomed to such matters, that some of the charges were found defective in form, owing to the accounts having been signed by the factor, under whose direction the expenditure had been incurred, and not by the proprietor who was then abroad, and thus the value of some years' improvements went for nothing.

Can you conceive that an outlay, such as you have witnessed, upon an unentailed property in the north of Scotland could, by any possibility, have taken place under strict Entail?—I think the peculiar circumstances of the estate alluded to, take it out of any general rule whatever.

On a comparison of the present condition of great entailed estates in Scotland, with that of the possessions of small proprietors in their neighbourhood not subject to the fetters of Entail, what conclusion do you draw as to the effect of Entails on the improvement of property?—In the part of the country I know best, beginning at the Queen's Ferry and going as far as Thurso, and I believe I know almost every estate between those two points, I think I could point out nearly every entailed estate, from those that are not entailed, from the condition of its improvements, provided it is an Entail of any standing; but at the same time I do not know how much of that impression may arise from knowing those which are entailed from those not entailed; I must of course except an estate with which an honourable Member of this Committee is connected, and which is an exception to the rule; but there are several estates in that district of country where there is perhaps the finest land in Scotland, and the best cultivation in the neighbourhood, and these of great extent, that are in the most lamentable state; in one case, in consequence of the embarrasments which are understood to affect both the present possessor and next substitute; in another, from the last heir in possession not chusing to expend any money on the entailed property.

When once an entailed estate in Scotland is involved in difficulty, from large sums being borrowed upon it, as may be the case under Lord Aberdeen's Act; is there any means of escape from that difficulty from generation to generation?—None that I see; besides the difficulties of the heir in possession preventing him granting any allowance for the maintenance of his heir, he is forced to procure money even upon worse terms than his father. This state of affairs naturally tends to produce extravagance and recklessness of expense.

When debt is once incurred, is it not interminable?—It appears to me to be so.

Do you conceive that an interminable debt to the extent of two-thirds of the rental, is compatible with the dignity and independence of the landed gentry?—Decidedly not.

Can you conceive any risk from the sale of estates, at all equivalent to the evils of such a situation?—I should think it would be a great relief to the proprietors of entailed estates; and I have no doubt it would be a great relief to the general state of Scotland.

It being admitted that it is most desirable to maintain the dignity and independence of the landed gentry, on which side should you say that the balance of risk preponderated, from giving them a power such as the Entail law of England gives, periodically to free their estates by sale, or from leaving them tied up, under the full operation of Lord Aberdeen's Act and the Improvement Act conjointly; the

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only limit to the debt incurred under those Acts, being by the assignment of two-thirds of the estate to a judicial trustee, and putting it under judicial management? —I cannot conceive a mode of settlement more perfect in all its parts, putting aside its technicalities, than the present mode of English settlement; and I cannot conceive any thing much more defective than the law of Entail in Scotland now is, since Lord Aberdeen's Act has been appended to it; and I can therefore have no hesitation in saying, that the law of Entail in Scotland, as it now stands at present, seems to me to require speedy alteration.

With a view of maintaining the dignity and independence of the landed aristocracy?—Yes, with a view to maintain the independence of the aristocracy of the country; always subject to this observation, that it is to be the substitution of a limited measure, and not a total revocation of the law of Entail.

Will you have the goodness to state the power which the owner of an estate in fee has in England, of imposing fetters upon the estate for the future?—By the law of England, any tenant in fee simple may, by deed or will, limit his estate for the life or lives of any person in being, and for twenty-one years thereafter; that term being contingent, and not absolute. I make that observation, because I know that of late a contrary mode of settlement has been adopted; but upon the present occasion, I think, as far as we are concerned, we had better not enter into such questions; and it is better also to avoid, as far as possible, all technical language, and to state the result generally, without embarrassing ourselves at all as to the manner of getting at that result, or endeavouring to describe the deeds necessary for that purpose. It shall be supposed, therefore, that this settlement has been made by will, it follows that those persons, therefore, who are tenants for life have only a life estate, with such powers as the testator may confer upon them. They possess an estate which they can as little defeat or charge, as the estate enjoyed by an heir of possession in Scotland, taking under the Act 1685; but all persons born after the death of the testator, are tenants in tail. The powers they enjoy are very different from the more limited powers possessed by a tenant for life; and the first of them that is capable of taking after the tenant for life in possession, there being no possibility of an intervening heir, may, on his becoming twenty-one, in conjunction with the tenant for life, by a certain form, get rid of the Entail, and vest it either in themselves in fee simple, or in any other way that they choose. A recovery, which is this mode of getting rid of an Entail, is generally suffered as soon as the tenant in tail comes of age; and the general course adopted is, that the uses of the recovery are generally made to enure to the joint appointment of the tenant for life and the tenant in tail, which keeps the whole matter open for any future arrangement, to which is added a provision, that if this power of joint appointment shall not be acted upon, either the limitation of the old settlement shall revive, or the deed goes on to make a new settlement. The result, however, is generally this; that a new arrangement, suitable to the actual situation of the parties, is made. If the tenant for life happens to have got into any difficulties in point of money matters, there is an arrangement made between him and the tenant in tail, by which their debts, or an adequate portion of them, are charged upon the estate; the tenant in tail receiving, on the other hand, a larger annual allowance, which is likewise made a charge, with new and ample powers to jointure his wife, and give portions to his younger children.

Then the practical effect of the law of Entail in England is, to harmonize the interests of the father and the son, and to lead to amicable arrangements, mutually advantageous?—No doubt it is.

Is not the practical effect of the law of Scotland, to render the heir next in possession very jealous of the conduct of his father, in the management of his property?—They seem to have no common interest, during their joint lives, in Scotland.

Will not the operation of Lord Aberdeen's Act, giving such large powers over the fee of the estate to the heir in possession, increase that jealousy upon the part of all the heirs in remainder?—It may have that effect, and probably will.

Must it not have that effect when the heir in possession has the power of appropriating two-thirds of the rental of the whole estate for the maintenance of his widow and younger children, without the control of the heir in remainder?—As I consider that Lord Aberdeen's Act can be applied only for one generation, it will have that effect upon that generation; afterwards the cause will in some degree cease

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cease, and therefore the effect will cease; but as long as the cause operates, the effect will follow.

Then angry feeling will be the effect in the first generation, and absolute destitution will be the effect in all remaining generations?—No doubt. With regard to the English law of Entail, I had gone so far as to say, that when a recovery was suffered, and the control of the estate was averted in the parties to the recovery, the result was, that the new settlement whatever may be the form adopted, converts the son (heretofore tenant in tail) into a tenant for life, subject, of course, to his father's life-interest; and his future issue male become tenants for life, thus carrying on the Entail for another generation, but under arrangements suited to the actual condition of the estates and of the family. The tenant in tail now become tenant for life, has, as I have already said, the means of charging a sufficient jointure both for his present or any future wife, the total amount being limited; and also for providing ample portions for his younger children, with such other arrangements as the particular circumstances of the family may require. Sometimes there is a power of charging put into the settlement, limited to a certain amount and for certain objects; such as for repairing the mansion-house, and every variety of case suited to the particular circumstances of the party, with powers of exchange; and of leasing necessary for the due administration but not the dilapidation of the estate; besides, the father sometimes retains or obtains the powers of jointing a future wife, and of giving portions to future younger children, sometimes he obtains the power to add to the jointure and portions of his existing wife and younger children.

But this law of Entail in England puts a certain control in the hands of the heir in remainder over the charges to be made on the part of the heir in possession?—No doubt it does; but it ought to be recollected, that if the tenant for life should die, without a recovery being suffered and the tenant in tail comes into possession of his estate, which sometimes happens, then of course the tenant in tail is empowered by himself to suffer a recovery, and to vest the estate in himself in fee-simple.

Even in those cases, is the result of your experience such as to lead you to think that a power of sale is frequently used by the tenant in tail, who is so made tenant in fee, even though the incumbrance should be considerable?—I should say certainly not. I may say that in the course of a professional experience in looking into titles, and in knowing the circumstances of a vast variety of property in different parts of England, I have found that landed property in England has remained to an extent in the same family, even in the middling ranks, beyond what any person that is not professionally acquainted with the fact would imagine, and that though it has frequently been possessed in fee-simple, by different proprietors, though it generally soon got again into settlement. The law of Entail in England appears to me to engender in general much prudence and circumspection in the administration of real property. The very chance of its being put eventually in jeopardy has, I am certain, produced this effect.

Is not this power of charging the estate, which is possessed under the English law, a great advantage in enabling the heir of Entail in England, by a prudent marriage, to bring fresh capital upon the patrimonial estate?—No doubt it is.

Is not the law in Scotland, which does not enable an heir under strict Entail, even in conjunction with his father, to make an advantageous settlement upon a lady that would bring a good fortune, highly disadvantageous with reference to bringing fresh capital upon the estate?—If I understand the law of Scotland, it is not possible for the eldest son of the heir of Entail in possession, to make any settlement which can charge the entailed estate, inasmuch as he may die before he succeeds to the estate; and then, if I understand the law of Scotland rightly, there is no means of those provisions being made charges upon the entailed estate; therefore even if such a marriage does take place, the lady's fortune is not made available in relief of the entailed estate; it cannot be expected that it should, as the benefit would, in that case, go to a distant substitute.

So that while heirs of Entail in England, with the desire they naturally have to preserve the family estate, are enabled, by a prudent marriage, to relieve the estate of debt, the Scotch heirs of Entail, with similar feelings, have not similar means?—That follows from the distinction between the two laws.

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Is not that difference of powers extremely disadvantageous to the maintenance of the Scotch aristocracy?—Certainly; and I think it is a state of things which is much to be regretted, and which it would be of vast importance, if it were possible, to remove.

Supposing an heir of Entail, in possession, had the most earnest wish to further the views of his eldest son, who had a prospect of an advantageous marriage under a strict Entail, he has not the power of making any settlement?—I can say, in my own case, that in my own family, having to fit out a young man for India, who being next heir, will, if he lives, become the proprietor of an entailed estate in Scotland, not of a very large amount, but a respectable estate; I was obliged, in conjunction with two other guardians, to advance the money for the purpose of fitting him out, and to take the chance of repayment.

What is the effect of an English Entail with regard to securing the debts as to attachment?—The rule of law in England is, that the tenant for life has no power of doing anything beyond the power that the deed or instrument, under which he takes, gives him.

Then he cannot affect the estate with debt?—Certainly not, unless he is empowered so to do under the deed or instrument.

In a case where a tenant for life dies, before a recovery is suffered, does it not vest the fee-simple in the tenant in tail?—If the tenant for life, and the tenant in tail, suffer a recovery together, of course the estate which the tenant in tail takes, depends upon the uses of the recovery, which may either be in fee-simple or in tail again, or for life, and subject to whatever other arrangement is made; that depends upon themselves.

Will you be so good as to explain the legal term of "a recovery suffered to certain uses?"—A recovery, in point of fact, is a mode of assurance attended with certain formalities, which puts an end to the Entail. The uses to which it shall enure are declared by a separate deed; practically speaking they are the limitations of the new entail substituted in place of the old entail, that which the recovery has put an end to.

Is recovery a fictitious proceeding?—It is so entirely. The reason why I wish to avoid entering into the technicality relative to suffering a recovery, is, that it would not only unnecessarily embarrass the present object of inquiry, but likewise because from what passed in the House the other night, there is every reason to think, that the unnecessary forms of this mode of assurance will not last much longer. Nothing, in point of fact, is more absurd or inconvenient in these times, than the forms attendant on a recovery are, though the effect is exceedingly good.

Was not that artifice of recovery devised, or at all events calculated to remedy something in the law of England similar to the strict Entail in Scotland?—Certainly it was.

And that at a very early period? Yes,

Do you conceive that the present Entail law of Scotland is advantageous to the aristocracy?—Certainly not.

Does it not happen, that entailed properties in Scotland pass away from the original family, into collateral branches, owing to the Entail being restricted to heirs male?—I believe every day.

Do not a great number of titles in Scotland go to heirs general?—Several of the more ancient.

Do you conceive that by any alteration of the Scottish law of Entail, by an assimilation or an approximation to the English law, the welfare and prosperity of Scotland as a country, will be benefited?—Decidedly so; the country at large would be benefited by the assimilation of the law of Scotland, as far as its principles will admit of, to the mode of settlement in England.

You have stated, that your experience has led you to observe, that the law of Scotch Entail has not had the effect of continuing estates in the hands of old families quite to so great an extent as the law of England?—I think I rather expressed myself inaccurately; what I meant was this, that the law of England though more limited in its operation, has been the means of preserving the estates in English families longer than a great proportion of the Scotch estates have been preserved in Scotch families; of course if they had once got into strict settlement in Scotland they could not be alienated, And I meant to draw this conclusion from that fact, that the more limited law of England, having preserved its aristocracy and their pro-

perty entire for so many centuries, I conceive that it has admirably secured its object, and that a similar result might be expected from the operation of a similar law in Scotland.

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Are you aware that a large portion of the estates belonging to the old families in Scotland, have been very recently entailed?—It is so.

Those estates, therefore, before they were entailed, were much more at the disposal of the possessors, than they would have been under the English law of Entail?—I am at the same time induced to believe, that the English families have possessed their estates for a much longer period than the Scotch families have.

Have not the English families possessed their estates for a very long period under the existing English law of Entail?—They have for a very long period; some families possess land that belonged to their ancestors at the period of the Conquest, many still enjoy estates derived from the date of that event, or the times immediately succeeding thereto.

And those estates in Scotland which have only been entailed very recently, were held up to that period, without any law of Entail whatever?—They were; but it must be observed, that up to a recent date the landed property in Scotland underwent many changes in consequence of the numerous forfeitures that took place in that country.

Does not that create a difference between the two countries, which might in a great degree account for the remark you have made, as to the continuance of property in particular hands?—No; because I consider the English families are of more ancient descent than the Scotch families, notwithstanding there is a very different opinion entertained upon that subject.

Are you of opinion, that the landed aristocracy, meaning thereby the gentry as well as the nobility, would readily agree to an assimilation of the English law with the Scotch law, upon the subject of Entail?—I am not prepared to say so at all; I think, if the measure, upon the whole, is a prospective measure, they would.

But not if it is a retrospective one?—That I am not prepared to answer in the affirmative.

Though fines and recoveries, which are the mode by which Entails are barred in England, are cumbrous and expensive machinery, are they in any way connected with the principle of the English law of Entail?—Certainly not.

Might they not be altogether dispensed with, and yet the principle of the law remain unchanged?—I have already stated, that I have no doubt that in a short time a more simple mode of conveyance will be adopted.

During the possession of the tenant for life, are any debts contracted by him, good against the estate?—Certainly not, unless he is empowered by the deed under which he takes, to charge them on it.

But if no such power be given by the deed of Entail, debts contracted by him personally, are not good against the realty?—Certainly not; the rule of law in England is this, that the tenant for life, who in point of fact bears a near resemblance to the heir of Entail in possession in Scotland, can do no act but that which the deed under which he takes, empowers him to do.

Then the tenant in tail succeeding and taking the estate in fee, as he may do by fine and recovery, is by no means answerable for the debts contracted by the tenant for life who preceded him?—Not unless he is also his personal representative.

But the real estate is not answerable?—No, in fact they are not charges upon the estate.

Is not the practical effect of this state of affairs such in England, that when an Entail is cut off by a father and a son uniting in a fine and recovery, the debts contracted by the father are almost invariably honourably paid out of the estate?—Almost invariably; there generally is an arrangement of the whole affairs when a recovery is suffered, and then the father's debts, or a portion of them, are charged upon the estate; and in consequence of that, there is an allowance equal to what may be supposed to be an equivalent to the amount of the charges upon the estate, given to the son, who is the tenant in tail; but it is evident that every arrangement of this sort must depend on its own circumstances.

Then the result of the whole is, that the father and the son make an arrangement which is mutually advantageous to themselves and to the public in the shape of the creditors, and by which all their engagements are honourably satisfied?—I believe that is almost always the case.

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Is not the power of cutting timber more strictly limited in England than in Scotland?—Certainly; at the present moment I know an estate in Scotland of considerable amount, where the heir of Entail in possession supposed his daughter was to succeed to the estate. Circumstances arose which led him to take a different view: he had planted extensively, and there was besides a great deal of old ornamental timber on the property. Within the last four years the whole of the timber upon the estate has been cut down for the reasons stated, and because the estate is found to descend to a distant substitute.

That he could not have done in England?—No.

In the execution of an English Entail, how many tenants for life are inserted?—It varies in every settlement, in general all the nearer connections in the family who are living at the time. It signifies not how many are put in, inasmuch as the first tenant in tail can cut them all off. I know one settlement of a great family in England, where it has gone through five or six families of the nobility, making tenants for life of every one of them; but that is of no avail as to perpetuating the Entail, which may be cut off on the first tenant in tail attaining twenty-one.

If in any legislative measure upon this subject, a retrospective action were given to it, and it was at the same time enacted, that all existing Entails in Scotland should be good during the life of the present heir in possession, and all substitutes now living and twenty-one years beyond that; how could what is termed a violation of vested rights take place, inasmuch as no living persons would suffer; and it would only trench upon the supposed rights of persons not in *esse* but in *posse*?—I think the greatest evil would arise, if any measure were to be adopted to allow either the heirs in possession or the next substitutes to dispose of the estates of themselves. I think it would be necessary to have some principle such as there is in the law of England, that two interests ought always to be parties to the arrangement; and inasmuch as the bill which is now committed to us violates this principle, I think it extremely defective in its retrospective remedies, as I have already stated I think it to be in its prospective clauses, inasmuch as it repeals and does not modify the Act 1685.

The question contemplates a change of law which shall provide, that all existing Entails shall be good during the life of the present heir in possession, and the lives of all substitutes now in being, and twenty-one years beyond; the operation of such a change would be, that all vested rights of persons now in being would be preserved and respected; do you see any objection in equity to trenching upon the contingent interests of persons yet to be born?—Abstractedly speaking, I do not know that I do; at the same time I should wish again to say, that whatever mode is adopted for the purpose of accomplishing that object, there ought to be two interests, if possible, brought forward for the purpose of making the arrangement; that is to say, they should be put in the same relative situation as tenant for life and tenant in tail, as in this country.

An Entail can only be executed in England on any number of lives in existence and twenty-one years thereafter, the first tenant in tail attaining majority, being enabled by process of law to possess himself of the estate in fee; if by the change, which has been alluded to, the first substitute under present Entails in Scotland, coming into possession after the extinction of all existing lives, were allowed, on attaining twenty-one years of age, to hold the estate in fee-simple; would not unity of principle both prospectively and retrospectively be preserved, and the similarity be perfect, of the law of Entail in both countries?—There would be this material difference; by the law of England the Entail may be barred as soon as the first tenant in tail attains twenty-one; and this would take place whatever number of tenants for life or in tail might be living at the time; but in the case supposed, no Entail could be cut off until all the substitute heirs of Entail were extinct, and the person then entitled to cut off the Entail might be a distant substitute not yet born. He might therefore be considered in the light of the first tenant in tail, and from that point the heir of Entail in possession and the next substitute might be clothed with the attributes incident to tenants for life and tenants in tail in England; and from that period, but not until then, the resemblance between the laws of the two countries, both retrospectively and prospectively, would be complete. I am inclined upon the moment to think, that this would be as good a method of bringing the two branches of this question to one wholesome result as any that has been suggested; it appears to possess many advantages; it trenches on no subsisting or existing right or expectation; and every future born substitute would come into existence with this contingency

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tingency annexed to his expectancy. It would make it more imperative however to give the heirs of Entail in possession in the mean time, some powers of sale and of charging for the outlay on improvements, such as I have already alluded to; but still I could wish that this first act be done by two and not by one, if this could be accomplished on principle.

Does any such danger result from the operation of such a state of affairs in England, as need excite any alarm with reference to a similar result taking place in Scotland?—I think there is no need for any alarm; but what I stated was, that I thought there was a feeling, with regard to that branch of the subject, that did not exist upon the other branch of it.

The Committee understand that an English Entail is an Act which comes to an expiration, if it is not renewed practically; are those Entails renewed so that the estates do remain entailed through a long course of ages?—An English Entail comes to an end by the act of certain parties entitled by law to bar it. It might also, no doubt by possibility, terminate for default of donees in tail; a very improbable event. Practically, few estates are put entirely out of settlement, they are almost invariably settled over again, unless there are some peculiar circumstances in their condition. There are families that get into difficulties, and the tenant in tail of course suffers a recovery and sells the estate.

But the common thing in suffering a recovery, is to name a new tenant for life?—The common thing is, that the uses of the recovery are declared to enure to the joint appointment of the tenant for life and the tenant in tail; that gives them ample power over any future arrangement; with the further provision, that if that power shall not be acted on, either the old Entail shall revive (if the phrase may be used) or a new settlement is made, which generally converts the tenant in tail into a tenant for life, and the estate is again entailed as far as it can be by law. At other times, the uses of the recovery are declared without any such joint power of appointment, by which means the estate is immediately re-settled under the new Entail.

Is it not possible in case of a recovery being suffered, the father and the son possessing the fee-simple, that the debts of the father may exhaust a great portion of the estate?—They cannot exhaust any part of the estate, unless the son consents.

But the debts of both, by their joint consent, may exhaust a great part of the estate?—If they chuse to make them chargeable upon the estate, they may be equal to its value.

Cannot a tenant for life prevent a recovery?—During his life he may, he is a necessary party during his life.

What means has he for the improvement of the estate?—None beyond that which he has under the powers of the settlement, in general only the rents of the estate.

Practically speaking, does not the tenant for life constantly, in England, lay out money in the improvement of the estate, trusting to the feeling of the next heir of Entail, in the expectation of raising the money when the law will allow him to join in suffering a recovery?—I should say practically, in England the tenant for life has no hesitation in laying out money for the improvement of an estate, and that there is a portion of it which is supposed to be that which he ought to lay out himself, and a portion of it is a large sum occasioned by any great work, that will benefit the Entail of those in remainder, more than his life interest is charged upon the estate.

Generally speaking, does not the next heir join with the heir in possession, when the law allows him, to raise the money necessary to defray the expense of outlay upon the property?—I should say, generally speaking, the tenant for life has little hesitation in laying out the money necessary for the improvement of an estate, upon a recovery being suffered. A proportion of that expense is supposed to be his own, but a proportion is often charged upon the estate.

Have you yourself conducted many such equitable arrangements?—No doubt I have conducted such arrangements.

In your opinion, under the law of England relative to the Entail of landed property, if a recovery is suffered or attempted to be suffered by a tenant for life enjoying a particular estate, and the remainder man not next in succession; what would the effect of such a recovery be?—It would have the effect of barring all the remainders subsequent to the estate of that person in remainder suffering the recovery; none of the prior estates would be affected.

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Do you conceive Scotland to be a well-inhabited country in proportion to its extent?—Some districts of it, certainly.

Are there any districts which you conceive not to be well inhabited?—I should say not, taking into consideration the nature of the country.

Do you conceive that that want of a portion of the inhabitants, arises from the system of Scotch Entail law?—I should say not.

The question refers to gentlemen, and the younger sons of the families of the aristocracy of the country?—It has been said, and I believe with some truth, that none of the younger branches of the aristocracy remain in the country, they find more scope for their talents in this.

You have stated, that you consider a great deal of the improvement upon entailed estates in Scotland, was owing to the rise of rents some years ago?—Yes.

Did not that rise of rents afford equal facilities to estates not entailed?—Certainly.

But you consider that the fall of rents which has occurred since, has effected more injury in entailed properties, than it has in unentailed properties?—Certainly.

Therefore the effect of the fluctuation of rents has been to the disadvantage of entailed properties?—No doubt of it.

Is not the improved system of culture in Scotland, and the use of large capital, saving manual labour, one of the principal causes of the agricultural population of Scotland not being so dense as in England?—I am not prepared to admit that the population in the agricultural counties in Scotland is much less dense than in the purely agricultural districts of England, if you exclude the hilly parts of the country.

Are not the farms, generally speaking, in the best cultivated districts in Scotland much larger than in the best cultivated districts in England?—I doubt this, and I likewise doubt very much whether those large farms have not the same number of people upon them in proportion as the smaller ones, though they are of a different class, and raise a greater portion of surplus produce.

If Entails were more limited in Scotland, would it be the means of introducing greater capital into that country?—Heirs of Entail in possession, and the next substitutes who might take advantage of the law, if it is to be assimilated to the English law, would of course get their money much more easily and upon far better terms than they do at present. I do know of my own knowledge at the present moment, that there are many heirs of Entail in possession who are in such circumstances, owing to the position they are in with regard to their Entails, that they are raising all their money upon annuity interest.

Therefore it would afford greater facility for men of capital settling in Scotland than they have now?—I am not prepared to answer that in the affirmative, because hitherto there has been a vast variety of persons connected with Scotland, especially in the colonies, who have made their money out of it. I think likewise that the power of entailing has rather induced a considerable portion of such persons to settle there.

If the practice of Entail were to proceed at the rate it has done during the last fifty years, would not it greatly prevent capital going to Scotland?—No doubt it would.

If the English nobility, enamoured with the law of interminable Entail in Scotland, transfer capital largely to Scotland for the purpose of purchasing and entailing estates, would not such a system inflict on Scotland all the evils of absentee landlords?—There cannot be a doubt of it.

Are you not aware of such purchases having been recently made in Scotland?—I know more than one purchase made for that purpose, and have reason to believe that more capital was prepared to be laid out in the same way, under the same inducement.

From your acquaintance with the two countries, would you not say that there are certain districts of Scotland, such as the Lothians and other districts, which are equal and perhaps superior in culture to any part of this island?—Part of it is equal, but I know as good farming in England as in any part of Scotland.

You are aware that many properties within those districts are entailed?—They are.

To what do you attribute the high improvement of those entailed estates?—Generally because they have been possessed by persons that had other means; but I wish to add, that I think from the state of the country for the last thirty years, there were many means of improvement that the heirs of Entail have possessed,

sessed, from the facility of credit arising out of the rapid rise of rent, which is never likely to take place again; and when the country begins to go back, which to a certain extent I think it must do from the diminution of rents, it will come with double effect against the heirs of Entail that have had that facility afforded it; besides, many of these Entails having been made by the purchasers of such estates, the means of improvement expired with them.

You think therefore that those circumstances are sufficient to account for the improvement of those districts, notwithstanding the obstacles presented by the Entail?—I think that goes a great way to account for it; I should be sorry to say that it accounts for it entirely, because the heirs of Entail have been, as far as their means could go, as desirous to improve their estates as any other class of the community; but their means have been more limited, and they will be more limited, as it appears to me every day.

Lunæ, 24° die Martii, 1828.

THOMAS FRANCIS KENNEDY, ESQUIRE,

IN THE CHAIR.

Patrick Irvine, Esquire, again called in; and Examined.

ARE you now prepared to deliver to the Committee, a Statement of a calculation which the Committee requested you to make?—I am.

Patrick Irvine, Esq.

24 March 1828.

[*The Witness delivered in the same, which was read, as follows:*]

"In endeavouring to comply with the desire of the Committee, to give a statement of the amount of burthens which may be created upon an entailed estate, under the statutes of 1770 and 1824, I find that satisfactory statements are of very difficult attainment. If burthens are to be laid upon the estate less than the sums allowed by the statute, the difficulty of calculation does not occur; but if it be the intention of the proprietor in possession, to burthen the estate to the full extent allowed by the statutes, he has various difficulties to encounter. In the first place, he is uncertain of the amount of rent and burthens affecting the estate as at the time of his death, being the period mentioned in the statute for doing so. In fixing the amount of an annuity payable to a widow, he is called upon to deduct the interest of provisions payable to children; and in fixing the amount payable to children, he is called upon to deduct the annuity payable to a widow by the first and fourth sections of the statute. But this cannot be done with any degree of certainty by the ordinary rules of arithmetic, if it be intended to burthen the estate to the greatest possible extent. It resolves itself into a question in Algebra of difficult solution. There are two unknown quantities, viz. The amount of the annuity to a widow, and the amount of the provisions to children, each of which is contingent upon the amount or value of the other. Suppose a rent of 1,800*l.* to be assumed, and in order to remove in some measure the above difficulty, let it be further supposed to be the intention of the entailed proprietor, to grant an annuity of 400*l.* to a widow. The calculation will stand thus:

Rental - - - - - - - - -	£. 1,800
Deduct annuity to widow - - - - -	400
	1,400
Three years Rental, allowed as provision to children, is - -	£. 4,200

A deduction of 620*l.* as the amount of annuity to a widow, and interest of provisions to children, would thus rather more than exhaust one-third part of the supposed rental of 1,800*l.*, and it would remain for consideration or discussion, whether the excess of 20*l.* beyond one-third part of the rental, falls under the tenth section of the statute, which provides, that heirs sued for provisions to children, shall be discharged upon aforgiving to a trustee, to be named by the court of Session, one-third part of the clear proceeds of the estate, without specifying in such terms as render it free from doubt, whether independent of the third part of the rents assigned as a provision for children, the estate may not be burthened to the extent of another third as an annuity to a widow, or only with one-third in whole. I shall now state a calculation, showing the extent to which an estate, of a

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supposed rental of 6,000 *l.*, may be burthened under the provisions of the statutes of 1770 and 1824.

For agricultural improvements; four years rental of 6,000 *l.*	-	£.24,000
For building or repairing mansion house; two years rental	-	12,000
		36,000

Under the statute of 1824:

Rental as before	£.6,000	
Deduct interest of 36,000 *l.* for burthens under statute of 1770	1,800	
	4,200	
Three years rental of 4,200 *l.* is		12,600
		48,600

Interest on the above sum of 48,600 *l.* amounts to 2,430 *l.* The estate may be further burthened with an annuity of 1,570 *l.* to a widow, so as to exhaust two-thirds of the rental; and the debt of 48,600 *l.* is to be redeemed by heirs so restricted without any power to affect the fee of the estate with securities. Interest on sums expended for building jails, and making turnpike roads, as allowed by statutes, would form a deduction from the rental, of 6,000 *l.*, but I have avoided minute hypothetical detail. The statute of 1824 is open to different constructions. It may be held, that if the statute of 1770 has not been acted upon, the heir, upon the burthen is laid, is intitled to assign to a judicial trustee, one-third of the rents in full of all burthens under that statute, as provisions both for children and annuity to widow, and thus to retain two-thirds for himself. Or it may be held, that the estate may be burthened to the extent of one-third to a widow, and likewise with provisions to children to the extent of another third, in payment of interest and extinction of principal. This may explain the appearance of inconsistency in some parts of the evidence depending upon the interpretation put upon the statute assumed in several questions. The result appears to me to be, that the entailed proprietor, who intends to burthen the estate to the full extent allowed by statute, can only accomplish that purpose by creating burthens to an extent beyond his powers, which are declared not to be void but only to be voidable as to the excess, and thus to force the succeeding heirs to their remedy of assigning to a judicial trusteee, and of accounting under the authority of the court of Session."

Is it your wish to offer any explanation or addition to any part of the evidence you have given on a former day?—It is; I have put my observations in writing, which I will deliver in to the Committee.

[*The Witness delivered in the same, which was read, as follows:*]

In the evidence which I lately gave, I am not sure if in some respects it may not convey a meaning, or if inferences may not be drawn from it, which I did not intend. I think I stated in answer to a question, that an irritancy or act of disobedience of the deed of the entailer might be allowed to be purged at the bar (as it is termed in Scotland) that is to say, that the court might allow the heir incurring it to remove the ground of complaint without forfeiting his right to the estate; and in answer to another question, I think I stated that I was not at the moment aware of any case in which the court had declared such irritancy. The meaning I intended to convey was solely confined to cases in which the heir might *instanter*, and completely remove the ground of complaint or challenge. If, for instance, the heir had omitted to assume the name of the entailer, or had neglected acts of minor importance, the court might not declare such highly penal consequences as the forfeiture of an estate to be incurred, if it were offered instantly to remove the objection. But I by no means intended to convey the meaning or to admit the inference, that *every* irritancy may be purged at the bar, or that the court would consistently with sound legal principle refuse to give effect to the deed of the entailer. If an heir of Entail should not insert in his title deeds the conditions of the Entail as required by it, or should possess the estate by titles made up on fee-simple, instead of titles under the restrictions of the Entail, or should incur other important irritances not instantly removeable, I do not see any grounds upon which the court could refuse to give effect to the deed of the entailer, if complete in its form and mode of declaring the irritancy. If such practice should be sanctioned, heirs of Entail would make up their titles in fee-simple, and lay the foundation of a prescriptive right under such titles, and would not complete titles under the Entail, unless the right in fee-simple were challenged. Entails frequently contain conditions which operate as effectual irritances, such as, that the estate shall devolve upon a second son, and that such second son, upon becoming eldest son, and succeeding to a title, by which the name of the entailer would be lost in the higher dignity, should lose his right to the entailed estate. Such condition would be effectual, although the estate conveyed to the second son should be more valuable than his succession as an eldest son, or even although no estate should accompany the title. Since I last attended the Committee, I have looked into a book upon the law of Entail published in 1822, by Mr. Sandford, who states, page 299, the rule of law with regard to permission to purge an irritancy, when incurred, to be, that if an heir "can restore matters to their original situation

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situation by avoiding the forbidden Act, he will be saved from forfeiture." Effect has been given to the following clauses in an Entail. "That if any of the heirs of Tailzie should succeed to the dignity of the peerage, they shall be bound and obliged to denude themselves of all right, title or interest, which may be competent to them of my said estate, and the same shall from thenceforth, *ipso facto*, accrue and devolve upon my next heir of Tailzie for the time being, sicklike as if the person so succeeding and bound to denude, were naturally dead." It was likewise provided, "that in case the heir succeeding should also succeed to any other estates under the like obligations," as to using the name, arms or title thereto belonging, "so that it might happen my said family to be sunk, suppressed or confounded with the said other name, estate or title to which the said heir may happen to succeed" in that case the heir was either to denude of the entailer's estate in favour of the next heir, or relinquish the other property, Fleming *v.* Elphinston, 19th June 1804. In another case, where it was provided, "That if the heirs succeeded to certain estates they should lose their right to the one then entailed; the same decision was given although the succession to the last did not open until the heir had succeeded to the other properties."—Lockhart *v.* Gilman, 25th November 1785, Sandford, page 289. A declaration of irritancy has been sustained against apparent heirs who had contravened by selling and contracting debt on the estate, under their right of apparency.—Gordon *v.* Murray, 21st June 1765, Stewart *v.* Denham, 1st February 1726, Sandford, page 291. An apparent heir, means the person entitled to the succession on the death of an ancestor, who has not made up or completed a feudal title to the estate. Where the Entail does not bear that the contravener is to forfeit both for himself and the descendants of his body, the forfeiture cannot be declared against his descendants. Mr. Sandford states it to be a more difficult question, whether such action may be brought against descendants, where the Entail bears that the contravener shall forfeit, not for himself only, but for his descendants; and refers to several cases upon this point, page 292. I think I stated, in answer to a question, that I had no knowledge of any leases for thirty-one years, under the statute 1770. I now observe, that one question has occurred as to the necessity of stipulating for improvements on the part of the tenant, in order to give validity to a lease under that clause of the statute. Mure *v.* Mure, 22 Dec. 1808. The point was not decided, and so far as I know, this is the only case under that clause of the statute. I presume that the endurance of the lease, having been made to depend upon stipulations of improvements by the tenant, which may or may not be performed, is one cause which has rendered that provision of the statute inoperative. If this clause of the statute had been frequently acted upon, litigation must have ensued as to the performance of the improvements stipulated for, in order to give validity to the lease. According to the desire of the Committee, I have procured a copy of the Report of the case Thomson *v.* Mowat, 11 Dec. 1824, and I now beg to lodge it. It appears from that report, that the decree ascertaining the amount of the sums expended upon improvements, was obtained some time after the improvements were carried on, which took place in the year 1802. The validity of the security was not a subject of dispute until 1822. In many cases, the heir upon whom the demand for payment is made, could not, by possibility, be made a party to the process of declarator. The procedure is directed against the next substitute, after the issue of the body of the entailed proprietor who expends the money. But such substitute may die before the person who creates the burthen, payment of which may be refused by his own descendants, who are no parties to the procedure, and the substitute upon whom the demand for payment is made, may not have been in existence at the time when the decree of declarator was obtained. Such decree of declarator becomes final within the period mentioned in the statute, in order to put at rest questions which may arise "concerning the amount of the sums laid out under the authority of this Act, at a great distance of time, when the material witnesses may be dead; for remedy whereof, and for ascertaining, in due time, the amount of the sums so expended," the process of declarator is allowed, But the point at issue may not regard the *amount*, (whether 100*l.* or 1,000*l.*) but the existence of *any claim* under the circumstances of the case. The limitations, in point of time, contained in the statute which I was desired to read, are not directed to the foreclosure of *every* defence against payment by substitute heirs, but solely to a defence as to the amount. In looking over the reports, for the purpose of complying with the desire of the Committee, a case fell under my observation, which shows the equity arising out of the law of Entail. A tenant became bound, by his lease, to erect farm-houses and offices of the value of 620*l.* to be repaid "by the grantor, or the proprietor of the lands, at the end of the lease," and there were other claims to be adjusted between the parties. The entailed proprietor, who granted the lease, died. The next heir of Entail, who derived all the benefit of the houses built by the tenant, pleaded, and the court decided, that he was not liable for the debt of 620*l.* incurred by a predecessor, and that the claim could only be made effectual out of the separate funds of the estate of the grantor of the lease, whose executors were accordingly found liable to the tenant. Todd *v.* Moncrieff, 14 January 1823. I beg to lodge a copy of the case, as contained in Shaw's Reports. If there had been no separate funds or estate, the tenant must have lost the money expended upon the estate, in terms of the lease. I was asked several questions with regard to any meetings of entailed proprietors, which have taken place in Edinburgh. I beg to lodge a printed copy of the Report and Resolutions by the Committee appointed at the meeting of Proprietors of entailed Estates in Scotland, dated 14th July 1827, which will show the object of the discussion, and the resolutions adopted by the Committee. As explanatory of my reasons for giving it as my opinion, that I should not recommend advances of money upon the security afforded by any procedure under the statute of 1770;—I beg to be allowed to refer to the sections of

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that statute, with regard to the means of recovering payment of sums so advanced. The statute contains a declaration and enactment in the following terms: "And whereas inconveniences and confusion might arise from the executor, assignee or other person or persons having right to the claim, arising from money expended by the proprietor of an entailed estate in the improvement thereof, their not timeously requiring the heir next succeeding in the estate to pay what they are entitled to receive by authority of this Act, and suing such heir to compel him to pay, if payment is not made; For remedy whereof, Be it enacted by the authority aforesaid, that the executor, assignee or other person or persons having right to the claim arising from money, expended by the proprietor of an entailed estate in the improvement thereof, shall be obliged within the space of two years after the death of the proprietor who expended the money, to require payment from the succeeding heir, and within the space of six months after the lapse of the said two years, to institute an action if the money is not paid in the court of Session, and to proceed without delay in recovering a decree for the sum due, and doing exact diligence for recovering payment thereof, or at least to the amount of one-third part of the free rents of the estate which shall become due to such succeeding heir." The statute contains the following provision, in case the creditor shall neglect to recover payment. "Provided always, and be it Enacted by the authority aforesaid, That the executor, assignee or other person or persons having right to the claim arising from money expended by the proprietor of an entailed estate, who shall neglect to require the next or any other succeeding heir or heirs to pay, and shall allow such succeeding heir or heirs to die without recovering payment from him or them, to the amount of one-third part, at least, of the rents that shall have become due to such heir or heirs, shall cease to be creditor to the subsequent succeeding heir or heirs respectively, to the extent of one-third part of the rents which shall have become due to the heir or heirs so deceasing as aforesaid; and shall be entitled to recover payment of his claim to the extent of such third part of the rents, from the executors or heirs only of the first or any other succeeding heir or heirs in any other estate than the entailed estate, and shall be entitled to recover payment of the surplus of his claim, if any be, and no more, from the subsequent succeeding heir or heirs respectively." The sum which the creditor has advanced, must thus be recovered in a very inconvenient manner, and is obviously exposed to hazard by the above provisions of the statute.

(Mr. Irvine.) I have here some other papers, which are illustrative of what I have stated in my evidence, which I will deliver in. The first, is a Report of the case of Thompson and others *v.* Mowat; the second is a Report of the case of Todd *v.* Moncrieff.

[*The Witness delivered in the same, which were read as follows:*]

11 Dec. 1824.

Adam Thomson, and Others, (*Mure's* Trustees); *Maitland.* Mrs. *Mowat*, and Others; *Rutherford.* Stat. 10 Geo. 3, c. 21.

By a deed of Entail, executed by the late Robert Mure, he conveyed the two estates of Livingston and Glenquichen to his only son "Adam Mure, and the heirs male lawfully to be procreated of his body, respectively and successively, whom failing to the heirs female, to be lawfully procreated of the body of the said Adam Mure, and the heirs male to be lawfully procreated of their bodies respectively and successively, the eldest heir female always succeeding, without division, through the whole course of succession, and excluding all heirs portioners." He then conveyed Glenquichen, (to which this question related) "failing of the said Adam Mure, and the heirs male and female descending of his body, in manner above mentioned, to and in favour of Margaret Mure, my daughter, spouse to David Thomson of Ingliston, ay and until Adam Thomson, her second son, attain to the age of twenty-one years complete, and then to the said Adam Thomson, and the heirs to be lawfully procreated of his body, whom failing to the heirs procreated or to be procreated of the said Margaret Mure, of this or any other marriage, whom all failing, to my own nearest heirs or assignees." Adam Mure, on his father's death, made up titles under the Entail, and possessed the estates till 1802, when he died without issue. Margaret Mure had predeceased him, leaving two sons, Samuel, (who was imbecile) and Adam, and six daughters. Adam, thereupon took Glenquichen, under the Entail, assumed the name of Mure, and proceeded to make improvements under the 10th Geo. 3, c. 21. His eldest sister had married a Mr. M^{c} Culloch, and being under the belief that in consequence of the above exclusion of heirs portioners, she was the nearest heir, Adam made the usual intimations to her; and on her decease he obtained decree, in terms of the statute, against David M^{c} Culloch, her eldest son, as the heir next entitled to succeed to the estate. Samuel died in 1820, and on the decease of Adam in 1822, a competition arose for Glenquichen, between David M^{c} Culloch and Mrs. Mowat, and others, the descendants of the other daughters of Margaret Mure. The court having sustained the claim of Mowat and others, (see *ante*, Vol. 2, N° 170) and the estate having been, in the mean while, sequestrated, the factor brought a multiple poinding relative to the rents. These were claimed by Thomson and others, the trustees of Adam, for the expenses of improvements. This was opposed by Mowat and others, who objected that the intimation ought to have been made to Samuel, (the brother of Adam) or at least to the six heirs portioners, and not to Mrs. M^{c} Culloch alone; and that, as this had not been done, they had no claim against the subsequent heirs.

The

The Lord Ordinary having reported the case, the court remitted to repel the claim of the Trustees. Lord Balgray was of opinion, that as the statute was intended for the improvement of entailed estates, it ought to receive a favourable interpretation, that Adam had made the necessary intimation to the party who was *bonâ fide* believed to be the next heir; and that it had only been ascertained that this was not the case, by a decision on a nice point of law. He thought, therefore, that both in equity, and to give due effect to the statute, the trustees were entitled to be preferred. The other judges were, however, of a different opinion, and held, that they could not proceed on the erroneous belief of Adam, but were bound to enquire whether the requisites of the statute had, in fact, been observed; and that, as Mrs. M^c^ Culloch was not the next heir entitled to succeed after him, due intimation had not been given, and consequently there was no claim under the statute.

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REPORT of Case, *Todd* v. *Moncrieff*.

W. Todd, Pursuer; *M^c^Farlane*, *Jeffrey* General *Moncrieff*, Defender, Clerk, Greenshields; *P. G. Skene*, Defender, Cranstown, *Maconochie*, Tailzie, Tack.

January 14, 1823.

By the Entail of Hallyards and Pitlour, the contracting of debt is prohibited. In 1807, Mrs. Skene, the heir in possession, granted to Todd a lease of part of the lands, and also of a mill, by which in consideration of a steading of houses to be erected by Todd, of the value of 620*l.*, she bound "herself or the said proprietor of the lands, at the end of the lease, to pay the said William Todd, his heirs and assigns, the foresaid sum of 620*l.*; and that at the expiration of this tack with interest," also, "to allow the said William Todd, and his foresaids, out of the rent crop 1813, the sum of 21 *l.*, and the like sum of 21 *l.* yearly during the remaining years of the tack after crop 1813." The value of the machinery of the mill was estimated at 21*l.* 17*s.* 3*d.* with regard to which it was stipulated that Todd should "keep and leave the lying and going gear of the like value, and in case the same shall be of less value, then the tenant is to pay the difference; but if of greater value the proprietor to pay the difference, not exceeding 50*l.* sterling at the end of the lease." The tack contained a clause of warrandice against Mrs. Skene, "her heirs and successors," but the obligations were not constituted as burthens on the next heir of Entail, in terms of the 10 Geo. 3. On the death of Mrs. Skene, in 1816, she was succeeded by Mrs. Skene as heir of Entail, and was represented by General Moncrieff as her executor and disponee. Mr. Skene having refused to implement the above obligations in the tack, Todd raised action against General Moncrieff, to have it found that he, as the representative of Mrs. Skene, was bound to perform them, and General Moncrieff brought an action of relief against Mr. Skene. The ground on which General Moncrieff rested, was, that as by the terms of the lease, the obligations were imposed upon the proprietor of the lands for the time being, the tenant must insist against Mr. Skene, and that, at all events, as Mr. Skene was alone to be benefited by the erection of the houses and the improvement of the machinery of the mill, he was bound, *ex equitate*, to give relief. The plea of Mr. Skene was, that the Entail prohibited the contracting of debt, and as the terms of the statute 10 Geo. 3. had not been observed, he was not liable. The Lord Ordinary decerned against General Moncrieff and assoilzied Mr. Skene. To this interlocutor the court adhered."

(Mr. Irvine.) I would also beg leave to deliver in, a Copy of a Report of a Committee, appointed at a meeting of Proprietors of entailed Estates in Scotland, held at Edinburgh, on the 31st May 1827, which is printed in N° 3, of the Appendix to my work upon Entails.

[*The Witness delivered in the same.*]

In searching the record of the Entails in Edinburgh, did you find the system of Entail confined exclusively to properties of a considerable size?—It would be extremely difficult to say what the size of the property is; because the Minute Book or Index, which I principally searched, gives a very general description of the property of the name of it; but in some instances there were such descriptions as struck my eye in passing, and I may almost say, the absurdity of them led me to make further inquiry.

What were those cases?—There was one, which was a house in Forfar; another was a lodging in Edinburgh; and a third was what is called in Scotland, a haugh, which is a piece of level ground on the banks of a river.

Was the statute of 1685, with all its formalities, religiously observed in those cases?—It appeared as complete an Entail as any in the record; and I am pretty sure there were other very small places that were entailed, that struck my fancy; but I did not think it an object to load my statement with every case of the kind; but those three I took a memorandum of at the time.

Although the statute of 10 Geo. 3. does provide for excambions under certain restrictions, yet is the inconvenience great of carrying an excambion under that statute into execution?—I have, in my own case, felt the inconvenience of it; and in order to effect an excambion to a more limited extent than I could have wished,

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I was under the necessity of incurring very considerable expense. My property is not entailed; and the property of the adjoining proprietor had not been entailed; the exchange or excambion might have been effected without incurring expense, which almost deserves to be mentioned.

Was the excambion, in the case you mention, indispensible for the joint benefit of you and your neighbour?—I considered that my own property could not be advantageously managed without such excambion, and I had not the least doubt that the entailed proprietor was equally sensible of the benefit to be derived to his property from making the exchange.

And all the difficulties and expense arose from the state of the law?—The expense attending it, if the exchange had taken place between unentailed proprietors, I should conceive would have been very trifling.

What proportion did the expense bear to the value of the property?—Before the exchange took place, the farm was managed in an unprofitable manner for all parties, and since the exchange was made, it has been much more advantageously managed; but not to such an extent as it might have been, unless for the limitations under which the excambion could be effected under the circumstances of the case.

If an heir of Entail were to succeed to his property completely exhausted, from his predecessor having let his land without any covenants of management, would the heir so succeeding have at law any claim on the personal property of his predecessor?—I do not see how he could make such a claim effectual.

James Alexander Stuart Mackenzie, Esquire, called in; and Examined.

J. A. S. Mackenzie, Esq.

HAVE you had great experience in the management of property under Entail, and not under Entail, in Scotland?—Experience I have certainly had of both.

Does the result of your experience lead you to the conclusion, that the management of one species of property is more easy and more advantageous to the proprietor, than the other?—Certainly.

To which do you give the preference?—To the unentailed.

Will you point out the facilities of good management which the absence of Entail affords, and contrast it with the difficulties of management which the Entail creates?—As regards both the general management and enjoyment of entailed and unentailed estates, the advantages appear to me to preponderate greatly on the side of the latter; for, besides the evils of tedious and expensive litigation, to which the uncertainty in the interpretation of deeds of Entail by the courts of law has frequently led, the proprietors of entailed estates can neither convey nor dispose of their lands in whole or in part, nor can contract debt thereon which shall affect them, nor make a settlement or disposition of the lands different from that under which they themselves hold their estates, nor advance money for improvements, nor raise it for family provisions, unless under the difficult forms and technicalities of the Montgomery Act (1770) or of Lord Aberdeen's late more perplexing Act (1824.) Hence in the general improvement of such estates, the means which are provided under the statute of 1770, are in fact very nearly inoperative; and I have not myself, though connected with entailed lands, ever attempted to take advantage of that Act of 1770, from believing that there were great technical difficulties in carrying it into effect.

Have you ever endeavoured to raise money for the improvement of an entailed estate under the provisions of that statute?—No.

The reason of your not so endeavouring to raise money being the notoriety of the technical difficulties being almost insurmountable in obtaining it at the legal rate of interest?—That was my principal ground for not obtaining it; but in my own case there was a peculiarity: I had an expectation of being able, after a very expensive process and a very long application to Parliament, to disentail a portion of that estate; and that Act was at length, after a considerable expense, carried through the House of Peers.

Did the Entail to which you refer, contain irritant and resolutive clauses?—Certainly.

Consequently it was a strict Entail under the statute of 1685?—It was.

Will you state what steps were taken by you to obtain the Act of Parliament to which you allude; and to what extent that Act relaxed the fetters of the original Entail?—I should state, that my connection with the estate in question was in consequence of my marriage, and the endeavour to obtain the assistance of Parliament was commenced before I had that connection; but in following out the endeavour

endeavour to obtain the relief of Parliament to the full extent, the payment of the entailer's debts was the object in contemplation, and at last the object obtained. *J. A. S. Mackenzie, Esq.*

Was it a matter of doubt whether those debts so incurred were good charges against the estate under the Entail, or was it admitted on all hands that they were good charges?—Good charges; but under the Entail it was requisite to go to Parliament to get redress. 24 March 1828.

Was there a particular power given under the Entail, of making an application to Parliament in the deed of Entail itself?—No; I understand that the law of the country holds that an entailer's estate is liable for his debts, and as such, the debts in question would have affected the estate; but as the Entail had taken effect, it was requisite to set aside that Entail by application to Parliament, though the law of the land, as I understood, would have made the entailer's estate liable for his debts.

Were all those debts incurred by the entailer, previous to the record of the Entail?—I believe so.

Both in the register of Sasines and in the record of Entail itself?—I believe so, but that fact I cannot speak to of my own knowledge.

Is not that a very important distinction in the law of Scotland?—Surely.

Because the Entail is not valid against the debts of the entailer, in the interim between making the deed of Entail and the record of it?—Clearly.

Then in your case you believe that the debts were good against the estate, even at the time of making the Entail?—I conclude so, from the circumstance of the legislature giving a power to sell to pay those debts.

Will you describe the nature of the consent of the different substitutes required in order to obtain that Act of Parliament?—Those consents were given immediately upon the eve of that marriage which led to my connection with the estate; but I believe they were numerous, and that the obtaining the consents was very expensive.

You cannot state what proportions of the various heirs of Entail were required to give their consent according to the various proximities of inheritance?—No, I could not exactly; but the consents were certainly numerous, and the obtaining them of course must have been expensive.

Have you contemplated the effect that would be likely to be produced by a relaxation of the law of Entails, with respect to proprietors bringing land into the market?—Not particularly.

Does your knowledge of the circumstances of the landed proprietors in Scotland, possessed of land clear of Entail, though labouring under pecuniary difficulties, lead you to the opinion, that they would generally bring their land to market to clear themselves of incumbrances?—I think if there was a facility given to borrowing, that would not perhaps be the immediate consequence; I do not think it necessarily follows, if there was a relaxation of the restrictive nature of the tenure of Entails now, that a great quantity of land would necessarily come into the market; I think the first step would be borrowing upon much easier terms.

Does not your general observation, of the feelings of attachment of the Scotch proprietors to the soil they possess, lead you to think that they generally part with their land with the greatest possible reluctance, and that they struggle with great difficulties rather than do so?—Generally; certainly I think the avidity to entail lands, when acquired, proves that.

How many years purchase is land worth in Scotland at present?—From my own knowledge I cannot speak; but I have heard it called latterly worth only twenty-five years purchase, though I have never heard of any being sold so low; I should say twenty-seven or twenty-eight of such a rental as should be guaranteed, to be a legitimate, fair, and exigible rental.

You have said that the facility of borrowing money would be much increased by some relaxation of the fetters of Entail; can owners of unentailed property now in Scotland borrow money upon heritable security with facility, if that security be good?—Certainly; within Scotland it is the security most preferred of any.

At what rate of interest can money be borrowed upon such security?—I have heard of no loan under five per cent in Scotland, except one of a large extent.

What is the average rate of interest at which a tenant under strict Entail must borrow money even for the purpose of improving his estate?—I should conceive never under nine per cent, and probably in some cases as much as twelve, though I do not not speak to this from my own knowledge.

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Then of course any change in the law, which enabled the heir in possession, under certain restrictions, to borrow money for the improvement of his estate on heritable security, would give all the advantage, both to the estate and to the proprietor, of the difference between five per cent and the annuity rate of interest you mention?—I conceive it would, and immediately; believing that that security is one that is very much run after in Scotland.

From your long residence in Scotland, and your knowledge of the feelings of the nobility and gentry of that country, do you believe that any alteration in the law of Entail, not abolishing it but modifying it on the model of the law of Entail in England, would be acceptable or disagreeable to the proprietors of entailed estates?—I should say, from the knowledge I possess, that, generally speaking, it would be decidedly acceptable. I know instances certainly where it would not be so, in the case of proprietors of very large entailed estates; but I conceive, generally, it would be acceptable.

Do you think that a prospective measure, which assimilated the law of Entail in Scotland to the law of Entail in England, which gives the entailer the power of tying up his estate for all existing lives and twenty-one years beyond it, would be a medium satisfactory to all parties, opening the commerce of land to a certain extent, and imposing fetters on the other hand to a certain extent, on the heirs in possession?—I should think, prospectively, it certainly would.

Supposing that a retrospective action were given, and that the operation of the statute of 1685 were limited in a similar manner, namely, that existing Entails under that statute should endure, during the lives of the present possessor, and during the lives of all existing substitutes, and that the first life not yet in existence coming into possession, on obtaining majority should hold the estate in fee; would that appear to you to combine a due regard to all vested interests of persons living, coupled with a relaxation in future generations of the law of Entail?—As a person interested in an existing Entail, wherein at least my family, if not myself, have a contingent interest, I feel some difficulty in answering that question; but I should conceive, if the prospective alteration takes place, it follows of course that a retrospective alteration of the same nature must take place to bring the property presently under Entail, something like *pari passu*, with that which is proposed to be affected with any future Entail. If I understand the question, the life of the non-existing heir is meant to be the life of the substitute of the Entail that may come into existence; in that case I should conceive the alteration beneficial.

Would that principle appear to you to have sufficient regard to all vested interests?—I should conceive it would, without taking into consideration the effect of interfering with the past disposal of property.

Have you ever contemplated the probable effects of Lord Aberdeen's Act?—Not very minutely; but I see clearly that it is almost impossible to carry Lord Aberdeen's Act into effect, at the same moment that operations under the statute of 1770 are also carried into effect, without reducing the heir of Entail in possession into a mere nonentity in point of income.

It being admitted, that the Act of 1770, on account of its technical difficulties, is rarely carried into execution, have you contemplated the effect of Lord Aberdeen's Act, pushed to its full extent unconnected with the statute of 1770?—I understand it to give power to burthen entailed estates to the extent of two-thirds of the clear income, leaving the proprietor one-third.

Is not it natural that the heir in possession should, generally speaking, avail himself of his powers to provide for his wife and children?—I should certainly conceive so.

Then, unless it is checked, you conceive that the operation of that statute will be very general?—Certainly.

Would such a result be, in your opinion, consistent either with the dignity or the independence of the future generation of landed proprietors in Scotland?—Clearly not.

Do you know any thing of judicial trusts in Scotland?—No; I cannot say that I do.

You are aware that the only escape given by that statute is an assignment in the court of Session of the whole property, reserving to the heir in possession one-third; from your general knowledge of judicial trusts, do you conceive that the management of the entailed estates, generally, throughout Scotland, by judicial trusts, would be advantageous, or disadvantageous?—I should conceive disadvantageous, inasmuch

much as it would be more expensive than would be otherwise necessary, but for the conditions of that statute.

Would not it vest a great part of the power of those estates in the hands of the persons so appointed, who are generally either accountants or lawyers?—I should conceive it would.

Would not that in your own opinion be a very disadvantageous state of affairs to the entailed proprietors?—I should conceive it would.

Contrasting that state of affairs with such a relaxation of the law as has been already pointed out, on which side does the balance preponderate, with reference to the maintenance of the dignity and comfort of the aristocracy of Scotland?—In favour certainly of an alteration of the present system, in my opinion.

If Lord Aberdeen's Act, and the Act of 1770 were repealed, would there be, in your opinion, any injustice in a provision that the heir in possession should have a power of raising an action of declarator in the court of Session, for the purpose of proving the *bona fide* outlay of money by himself or his immediate predecessor on the estate for improvement, and that when the court was satisfied of such outlay, they should be empowered to make the debt good against the estate, of course with some limitation as to the amount, say three or four years rent?—I think it would be very just.

Some power of course must also be given to the heir in possession and the next heir conjointly, to make a provision upon the marriage of such heir, and for his younger children?—I should think so certainly.

Are you aware of many cases in which securities have been believed to be constituted, and where in fact they have been found to be no valid security?—None I think, of my own knowledge; I have heard of a case within a short time, of the court having found that what was considered a good security upon a large estate was not valid. I heard the sum called as large as near 100,000 *l.*, and I think I may say from the agent of the person himself, in another instance, I have heard of difficulty in the case of outlay for a mansion-house in the county of Perth, but I do not know the facts.

Do you consider that one great cause of the Act of 1770 being inoperative, proceeds from this circumstance, that it is necessary to expend the money in the first instance before you can create a security, and that consequently many cases may arise in which there may be no means of procuring the money to be so expended, in the first instance?—I believe so, and I believe also from a disinclination on the part of those having the principal management of money transactions in Edinburgh, not liking that kind of security.

Must it not be difficult to obtain an advance of money without any security, in the first instance, though you could subsequently constitute a good security?—Certainly.

Do you apprehend, with regard to the distant counties with which you are acquainted, that if some facility were given for the expenditure of capital upon entailed properties, that a great additional value might in many instances be conferred upon them, and a large population be employed upon their improvement?—I think the difficulty at present, supposing capital were at command, arises from the uncertainty of the return very much, in consequence of so great a depreciation in the value of all produce.

Are there not great tracts of land, which are now completely unproductive, from the want of the most necessary means of carrying on a species of cultivation, for which they are perfectly adapted?—I would say in the Highlands, there is an outlet for capital to a large extent in the case of the fisheries, which I do not believe that any highland proprietor under the fetters of Entail can possibly carry into effect.

Are you not aware, that within a few years money was very frequently lent in Scotland upon heritable security at four per cent, and in many instances even as low as three and a half?—I think I never heard of any large loan but one in Kinross-shire at four per cent; there may be several of smaller amount. The loan by a London Insurance Company, I believe, was upwards of 100,000 *l.*

Do you not think that if all the fetters of Scotch Entails were got rid of in three lives, that that would not also have a tendency to get rid of all the old gentry in the country?—If I understand the question, it is whether there would not be a change of property; I should conceive to a certain extent there would, but I believe the first operation would be to borrow money to relieve themselves without a change of property.

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Have not the rents in Scotland fallen of late considerably?—Very materially.

Do you conceive that that affects entailed proprietors to a greater degree than proprietors of fee simple estates?—Certainly, because I conceive that entail proprietors having nothing but the two Acts of relief which have been referred to, have no other means of borrowing, which must be the necessary consequence, as they cannot sell to meet their difficulties, in consequence of the depreciation of property and the lowering of rents.

In all probability, will not rents get considerably lower than they have been?—I should conceive, if the present system proceeds of return to metallic currency, it must be so.

And you do not imagine that a rise of rents confers any greater advantage upon the proprietors of entailed estates, than on the proprietors of unentailed estates?—On the contrary, I believe the late rise of rents is one of the great causes of their difficulties, because while they enjoyed them they lived up to them.

At the time of that rise of rents, it of course conferred so far a benefit on those proprietors?—Equally with others, but not more than with unentailed proprietors.

What part of Scotland are you principally acquainted with?—Principally with the north of Scotland and with Ayrshire, and formerly with Galloway.

Are you able to state, from your knowledge of the country, that there is generally any marked difference between the unentailed and entailed properties in point of improvement?—I do not think I could state any particular estate under Entail where the want of improvement has been so material, as to make a very marked difference in its character for improvement; but I believe that the present state of cultivation of land in Scotland, generally, is to be traced very mainly to that system of improvement which took place during the high prices in the late war; and that the entailed estates partook of it. In the north of Scotland, I cannot mention any instance of the kind referred to; in the south I have known the condition of one estate affected very materially by the management of the heir in possession, namely, the Queensberry estate, but that has been much counterbalanced by a very liberal outlay since.

Are you aware of the general feeling prevailing amongst proprietors in Scotland upon the subject of Entails?—I cannot say that I am; I think, in general, the difficulties of their circumstances lead them to wish for an alteration.

Where long leases are falling out upon entailed estates which were granted during the war, are you not aware that the entailed proprietor cannot give that encouragement to improvement by joining in an outlay with his tenant for the purpose of improvements, which the unentailed proprietor would find it his interest to do?—Certainly.

Consequently although improvement might be produced on an entailed estate by the high war prices, when those prices fall, the retrogration is certain on an entailed estate, while it is improbable on an unentailed estate?—It does not take place to the same extent on the unentailed estate, but it is nearly certain on the entailed estate.

Is not it natural that the tenants under long leases, towards the expiration of them, unless they can renew upon liberal terms with their landlord, will use every exertion to get back the capital they have laid out upon the estate?—I believe both in cases of entailed and unentailed estates, that is the case.

In the case of the unentailed estate, would not the proprietor find it his interest to renew on favourable terms to the tenant joining in the expense of the outlay, and on terms which the entailed proprietor cannot enter into?—Certainly, which is the great advantage of the unentailed proprietor over the entailed.

The unentailed proprietor may of course, in the mean time, reduce his rents?—Certainly; in my own case it has been the greatest difficulty I have had to contend with. The estate being entailed, the impossibility of obtaining either the sanction of the court of Session, or any legal advice to lower the existing rents, at which the entailer had his estate let when he died.

Although that was ruinous to the tenants and disadvantageous to you?—It would have ended in the ruin of the tenants if I had put into effect the law, but they were in such difficulties, that it was nothing but a nominal rent; they were unable to pay, and they only waited to see whether I would sequestrate and eject them, or whether I should take upon my own shoulders the reduction of the rent without the advice of counsel or the sanction of the court of Session.

Has that led, ever since your possession of the property, to a depreciation of the fee simple value of the property?—There has been no improvement either by the proprietor

proprietor or the tenant; and till the estate was sold, under the sanction of the legislature, it was impossible to move in any way. I could not obtain the sanction of the court, and no counsel would advise me to lower the rents, so as to meet the depreciation in the value of produce. *J. A. S. Mackenzie, Esq.* 24 March 1828.

Is not the proprietor of an entailed estate frequently called upon to incur very serious personal risk, by exercising his discretion in the reduction of his rents?—In my own case I have found that difficulty, and I have perhaps incurred the risk.

Do not you believe that many proprietors of Entail have been driven by necessity to incur irritancies by making the necessary reduction of their rents?—I do not know it.

Are you aware of any Entails that took place during the war, in which a clause has been inserted in the deed of Entail, that no farm shall be let for less rent than was at that time received, without first being put up by public roup?—The case of the Entail to which I have alluded to is one.

So that no reduction of rent can now take place upon any such farm, without the farm being first put up by public auction?—I am at this moment under that difficulty, in one part of that entailed estate which was not sold under Act of Parliment in question. In the case I have mentioned, I have at this moment a difficulty with regard to letting the only parish which in the case of the Island of Lewis was not sold under the Act of Parliament, at a less rent than it stood at under the entailer's deed.

Is it not notorious, that in by far the greater number of Scotch Entails, there is a provision, that land shall not be let, as it is termed, with a diminution of the rental?—Certainly I believe so.

Does not that clause expose the owner to have imposed upon him, at all times, an exceptionable tenant, who may bid the old rent?—Unless he can get the better of it by any means, I should conceive, that on its being exposed to public auction, he must take the best bidder; and he cannot take the one he might prefer to take.

Richard Alexander Oswald, Esquire, again called in; and Examined.

CAN you give the Committee any information respecting the difficulty of constituting valid and effectual securities upon entailed estates, even where such securities are permitted in the terms of the Entail?—I can state to the Committee, that in my own case I found, that in making provision for my daughter at the time of her marriage, I did so under the terms of the Entail, which runs in this way, that it provides for the children recovering their securities after the death of the person giving the security, within a limited time; but it added a clause to it continuing their right only till they happened to be twenty-six years of age. Having, along with my son-in-law, borrowed money to purchase land upon the strength of what was secured, as we thought, under the Entail; the person that lent the money, seeing this in the Entail, brought an objection to the security and called upon me for the money, wishing to set the thing aside; I went to the court of Session with a declarator action, to state what was the true meaning and interpretation of that clause in the settlement. The court of Session, after deliberating upon it, said, that it was evident there was some mistake, and that they would hold themselves authorized to rectify it when the evil occurred; that is, if my daughter should find that she could not get a provision after my death; but in the present instance they demurred about interfering in any way whatever. After the case was argued, they did pass the declaratory action; stating, that from some defect in the wording there was an apparent want of power, but that they conceived it ought to be so understood; and upon this the person that lent the money still said, that he was not satisfied with any such declaratory action, and was advised by counsel to have nothing to do with any security under the settlement of Entail, and called up his money. *R. A. Oswald, Esq.*

Were you compelled to pay the money?—I paid the money.

David Low, Esquire, called in; and Examined.

WHERE do you reside?—In Edinburgh at present and partly in Berwickshire. *David Low, Esq.*

Have you for a long period, had an extensive acquaintance with landed property in Scotland?—I have had considerable experience for the last ten or twelve years in the state of landed property in Scotland.

Did not your experience commence along with your father in surveying and giving advice with respect to landed property, on a very extensive scale?—It did so; but

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but my personal observation has been more extended within the period of ten or twelve years. My experience reaches much further with respect to landed property in Scotland.

Have your opportunities led you to form any opinion with respect to the operation and effect of the law of Entail in Scotland as affecting landed property?—I conceive that the effect of the law of Entail as it exists at present in Scotland, is unfavourable to the progress of internal improvement, and that it tends in a considerable degree to prevent the application of capital to the improvement of the country.

Have you formed that opinion from a variety of cases that have come under your observation?—From a variety of cases which have come under my observation.

Will you be so good as state to the Committee, the grounds upon which you form that opinion?—I conceive that the law of Entail operates in several ways in preventing the application of the revenue of the land or of capital to the improvement of estates. The first is the preventing the transfer of land by sale. It is a matter of constant observation, than when an estate passes by sale from one person to another, it generally derives some benefit from the change; the new purchaser has usually some schemes of embellishment or utility to carry into effect; and we often see, that the simple transfer of an estate totally changes its character and aspect in the course of a very short period. You cannot pass through Scotland without seeing this effect; when a large estate is sold and parcelled out, you frequently see new plantations forming, new buildings erecting, and all the marks of improvement going on. I conceive, therefore, that the law of Entail, by preventing the transfer of property, prevents in a great degree the application of capital to the improvement of the country.

In passing through Scotland, have you been generally struck with the different appearance of land which you believed to be entailed, and land which you believed to be held in fee-simple?—That question requires to be answered with considerable caution and with many limitations. There are numerous estates in Scotland in which there is no difference in favour of transferable property; on the contrary, I should say, that if I were to select some instances of the best managed estates in Scotland, I should select some entailed estates as models; and this observation applies, not only to estates, but to particular districts in which there is no perceptible difference between entailed and unentailed property; but I should say, generally speaking, that so far as my observation extends, there is a very material difference throughout Scotland, between the transferable and non-transferable estates, which is chiefly observed in the less improved parts of Scotland.

Is the improvement of Scotch entailed properties retarded by the less considerable means of carrying forward that improvement, which entailed proprietors naturally possess?—I conceive so. I may observe, as an illustration of that, that I have frequently occasion to be consulted in the case of considerable entailed estates as to the means of saving present expense, how such and such a building may be avoided, or how such an outlay may be postponed or thrown upon the subsequent heir, or thrown upon the tenant, in which case it is necessary to accept a lower rent; but the tendency of that is to prevent the tenant from applying his capital to the improvement of the land. I may also mention, that in the case of lands that have been recently sold, I have found it more frequently necessary to moderate the desire of improvement on the part of the acquirer of the property, by urging upon him considerations of expediency and prudence. I conceive therefore these two principles of action have a very important practical tendency.

Does your experience lead you to say, that it is frequently the object of entailed proprietors to procure as much from the land as possible, and to do as little for its permanent benefit as possible?—Very frequently.

Do you conceive that such a system of action must tend materially to the deterioration of the condition and value of such property?—I conceive that it must very materially do so.

Do you consider that entailed proprietors have less inducement to do justice to or to improve their property, than those who hold it in fee simple?—They have in many cases less inducement to do so.

Can you state in detail the grounds on which you form that opinion?—The proprietor of an entailed estate has frequently much more pressing duties than the improvement of his property for the benefit of an heir; he may have children to provide for, and other objects; and I conceive that the duty of providing for his children may frequently appear to him to be greater than that of laying out his income for the improvement of his estate. I may observe too, that as far as my observation

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observation has gone in conversing with entailed proprietors, particularly those who are in embarrassed circumstances, there is an indisposition to lay out money in improvement; they are very apt to consider themselves as life renters, or something very analagous; and I have even known cases where feelings of indifference, or even dislike, have existed towards the succeeding heir; and in those cases the effect has been extremely injurious. I have known it not only prevent the laying out of money in improvement, but lead to an actual deterioration of the estate. I believe there are some cases of that kind at this hour in Scotland; of course the names cannot be mentioned.

Do you consider that the general opinions you have now stated, are applicable to large portions of Scotland held under Entail?—To a considerable portion of Scotland.

And consequently that those portions to which you allude, labour under serious and permanent disadvantage, if the law remains as it now is?—I conceive so.

Can you inform the Committee, what causes have tended to produce different results from those which you state to be the probable and general effects of the entailed law, in those districts where you say there are certain entailed estates which are in the highest state of improvement, and which not only bear a comparison with, but perhaps may be even superior to unentailed properties in the same neighbourhood?—Many of the Entails are of very recent origin, and the improvements were began before the Entails themselves were made, or the improvements were made by the first entailers; and I may state here a remark that has occurred to me, that I generally find the first entailer, or his immediate heir, more desirous of making improvements than subsequent heirs of Entail. There are many estates in which the proprietors have been affluent for a very long period, which is not the case on entailed estates generally in Scotland. In those cases the proprietor expends his funds as liberally, or sometimes even more so, than a fee simple proprietor. Such estates are to be found in every part of Scotland.

Do you apply those observations to such districts as the Lothians and the Carse of Gowry, which are perfect patterns of improvement?—I conceive some general causes have operated in those similar districts. Improvement in them was introduced at an early period; a very happy relation was established between landlord and tenant in regard to leases; capital has been gradually accumulated in those districts, the necessary accommodation of buildings and fences has been obtained, and now nothing remains but to let the land, and the tenant is now the person that carries on the improvement.

You are speaking of entailed estates?—Yes; in such districts you perceive in general no difference between the entailed and the unentailed property.

Consequently your observations apply to districts where an outlay may be required to put, as it may be termed, property in motion?—My observation applies generally to that state of things, where not only the capital of the tenant but a part of the revenue of the landlord must be applied, in order to promote improvement.

Do you consider that proprietors of entailed estates, are frequently placed in situations of extreme difficulty in transacting with their tenants, arising out of the restrictions imposed upon them as to not letting with a diminished rental?—I have known such cases.

In such cases, is it not extremely difficult for a landlord to do justice either to his own feelings of liberality and fair dealing, or to the fair claims which a tenant may have upon him, in consequence of a change of times?—It is often impossible to do justice; and I have seen cases where estates would have been absolutely ruined, if they had not been let under the previous rent.

Consequently, without incurring the risk of an irritancy, it is impossible for the landlord in such cases, to do justice to his tenant?—Quite impossible, in numerous cases.

Have you had occasion to turn your attention to the operation of the statute of 1770, with reference to the powers which it confers on entailed proprietors to carry on improvements?—I have occasionally.

Do you consider that that statute has materially or sufficiently placed it in the power of entailed proprietors to do justice to their estates?—I conceive it has done so in a very slight degree, except in one of its provisions that it has extended the power of granting leases in cases where they could not be granted under previous Entails; and in these I conceive, it has been beneficial.

Do you allude to the provisions, whereby it is permitted to let for the period of thirty-one years, provided the tenant makes certain outlays?—Yes.

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Do you imagine that the power given under that Act, of raising money upon the security of the estate for the purpose of improvement, has been generally acted upon in Scotland?—I believe it has not been very generally acted upon; and I conceive that it is not in the slightest degree calculated to promote improvement.

Will you state the grounds of that opinion?—It may perhaps enable one proprietor to make an improvement; but in exact proportion, or a still greater degree, it prevents the succeeding proprietor from doing so. I conceive, therefore, that the statute of 1770 is quite useless, as regards making improvements.

Does it ever happen that the improvements executed under that Act, by proprietors in possession for the time being, are of a temporary character and not always calculated to confer a permanent value upon the property?—I have known cases, where it has been for the mere purposes of ornament; but being once expended, it is afterwards a fund for the children of the entailed proprietor. A person wishes to ornament his place, and he may make it a burthen upon the succeeding heir; but he would ornament his place at any rate.

Is it your opinion, therefore, that what might have been contemplated by that statute, has not by any means been attained by the method which has been resorted to in the execution of it?—I conceive so.

Does part of the difficulty under that Act, consist in the technicalities, with which it is extremely difficult to comply effectually?—It partly lies in the technicalities, and it partly arises from this fact, that the money must first be expended before it can be obtained.

Do you conceive it is frequently not in the power of an entailed proprietor to command the money that is required in the first instance, though he might afterwards give a security for it upon the property?—It is not always in his power to do so; but I conceive that, generally, lenders will object to the security provided by that Act.

Is it your opinion therefore that since the periods of the passing of the Act of 10th Geo. 3. if a more efficient means of improving entailed estates had been conceded, that a much greater extent of improvement would have been executed?—I am satisfied that there would.

Can you state any particular district of Scotland to which your observations as to the effect of Entails apply?—There is one county to which I have had occasion to pay some attention, the county of Wigton, which I conceive has suffered prodigiously from the effect of Entails; I believe that the greater part of the county is entailed, and the state of improvement in that county is perhaps as low as in any part of Scotland.

Do you conceive that that arises from any natural circumstance in the position of that county, or in a great degree from the operation of the law of Entail?—In a great degree in consequence of the law of Entail; because I have observed, that on certain properties which are not entailed, improvements have been carried to a very considerable extent; while I have observed, that on others that are entailed no improvements have taken place.

Has not that county great advantages in the way of conveyance by sea for produce, if it were in a state of improvement?—It has considerable advantages.

Does it not lie under considerable disadvantage as to internal communication, the roads to it, in one direction at least, being extremely bad?—I am not aware that it lies under any peculiar disadvantage in that respect.

Do you consider that great benefit might be conferred on the community in general, and on individuals in particular, if a power to disentail a limited portion of entailed properties were conceded to heirs in possession, by which means a power of adequate and proper improvement of their estates might be conferred upon them?—If I am right in the general opinion I have formed as to the effect of Entails, of course diminishing the extent of Entail must be beneficial.

Do you think that upon entailed properties additional value might be created upon the remaining part, supposing a portion were sold for the purpose of improving that remaining part?—Yes; I conceive that such a disentailing might operate beneficially in two ways; in the first place, it might operate by relieving the proprietor in possession of those difficulties which prevent him from fulfilling his duties as a landlord; in the next place, it would operate beneficially by making a part of that property the subject of exchange.

What is your opinion with respect to the effect that would be produced upon the value of land in Scotland generally, if under any relaxation of the law of Entail some portion of that entailed land were to come into the market?—My answer to that

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question must, in some degree, depend upon the portion that would come into the market. If the portion were not very great, I do not conceive that it would be likely to produce much, if any, effect upon the price of land; I do not conceive that the price of land is like some commodities, affected merely by the abundance or scarcity of it; land is purchased not because it is plentiful or scarce, but because it yields a certain return; in fact it is known, that though the quantity of disposable land in Scotland is diminished very greatly in consequence of the Entails, yet the price of land in Scotland has not risen. About the middle of last century it sold for about thirty years' purchase.

What do you conceive to be the correct value of land at present in Scotland?—It is extremely difficult to say, from so little land having been sold within the last few years. I know an estate on the banks of the Tweed in very favourable circumstances, which after being long exposed, was sold at about twenty-five years purchase.

Have you known that many estates have been sold at so low a rate as twenty-five years' purchase?—No; I have known also land recently sold in the neighbourhood of Edinburgh at more than thirty years' purchase.

Was that with a view to building?—No.

From your experience of the land market, would you fix the ordinary rate at about twenty-seven or twenty-eight years purchase?—I should scarcely fix it so high at this moment.

Has it not frequently happened that after a period of comparative stagnation the value of land has risen very rapidly to a very high rate?—Previous to the late convulsion in the commercial world, land had very generally in Scotland risen to thirty years purchase, with a strong tendency to advance beyond it; since that it has fallen, and in fact very little has been sold.

Is that generally the case throughout all the counties in Scotland?—Generally very little has been sold of late.

How many years purchase are purchasers in general willing to give?—From the circumstance referred to it is difficult to say, but I should suppose about twenty-five.

Do you suppose that a man wishing to lay out a considerable sum of money upon the purchase of land in Scotland, would find great difficulty in procuring a choice of land?—Yes, very considerable.

Are you aware of an Act having passed in 1824, conferring powers on heirs in possession to provide for their wives and younger children by burthening the estate?—I have seen such an Act.

Have you had occasion generally to form an opinion as to the tendency of that Act?—It appears to me that the tendency of it will be to aggravate very greatly the evils of Entails.

But it is presumed your experience has not led you peculiarly to direct your attention to the operation of that Act?—No, I merely give an opinion as to its probable effect; the Act itself has scarcely come into operation.

Have you any reason to know at what rate of interest heirs under Entail are frequently under the necessity of raising money?—I had occasion to know a case very lately, in which it was raised at ten per cent.

Will you state generally what is your opinion as to the increase or diminution of the evil arising from the law of Entail since the passing of the Acts 10 Geo. 3. and 5 Geo. 4.; whether those Acts have in fact increased or diminished the evil of the previous law?—I should conceive that they have increased the evil of the previous law; and that in their combined action by which the heir of Entail can be burthened to the extent of two-thirds of his estate, they must still further increase the evil. I conceive that the entailed proprietor who is left with only one-third of his free rental, upon which must fall the expense of the management of his estate, the whole expense of keeping up perhaps pleasure grounds, a mansion-house, and numerous charges from tenants upon the falling in and renewal of leases, and losses arising from the bankruptcy of tenants, is placed in a most unfortunate condition.

Do you mean the Committee to understand, that the proprietor, although he has reserved to him one-third of the nominal rental, must undergo a still further diminution of his income by the unavoidable contingencies of landed property?—Yes, I can conceive cases in which he will have almost nothing left.

What do you consider therefore must be the tendency of the law as it now stands in affecting the respectability and the comfort of entailed proprietors in Scotland?—

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To injure the respectability and diminish the comfort of the entailed proprietors of Scotland.

Do you conceive that such effect must go on progressively increasing from generation to generation?—I conceive it must go on progressively increasing in a considerable ratio.

What is your opinion as to the general feeling in Scotland with respect to a change in the Entail law being desirable or otherwise?—I believe a universal feeling prevails in Scotland that the further progress of Entails should be checked; I have never heard a dissentient opinion upon that point. As to the other part of the question, namely, the affecting the existing Entails, there is of course a considerable difference of opinion, but I should say, as far as my observation goes, it is generally thought highly proper that the existing law of Entails should be modified.

Do you mean the law with respect to Entails which now exists?—Yes; and as affecting properties that have been entailed under that law.

Do you wish the Committee to understand that you mean that some relief should be given to the existing generation living under Entail, and at the same time some relaxation for the future?—I have already given my opinion as to the general feeling in regard to the expediency of a change in the law; but I should feel a difficulty in giving an opinion as to the general feeling regarding particular modes of relief.

What is your own opinion upon that subject?—My own opinion is, that it would be beneficial to relieve to a considerable extent the present generation.

You stated that you had sometimes occasion to check the rather inordinate desire of new possessors of land to make extensive improvements; does not the law of Entail restrict that inordinate desire?—I spoke of unentailed property.

Then in an entailed property he could not indulge that desire?—In an entailed property, generally speaking, he could not indulge that desire and would not form it.

Do you not suppose, that the land in general suffers more from the restrictions put upon the entailed proprietors with regard to improvement, than it does in the cases of illjudged speculation to which you refer?—I conceive that the practical effect of those two principles of action is this, that in the one case improvement may be precipitately hurried forward to the injury of the individual; and in the other case it must be retarded to the injury of the community.

When you speak of the benefits to be derived from remodelling the law of Entail, did you mean benefits to the country of Scotland at large?—I do.

Are you aware of any particular benefit that results at present, or that may result to the country of Scotland at large, if the present law of Entails was to be preserved?—No, I am not aware of any benefit that would result if it were preserved, but quite the contrary.

Can you form a comparative estimate of the benefits resulting from the one system and the other; the one system being the preservation of the present law of Entails, and the other the remodelling of it?—I conceive that it would be better that the laws should be altered and materially altered, but I cannot give the comparative estimate required.

Will you state, a little more particularly, the extent to which you think that alteration should go?—I am not prepared to give an opinion as to the extent to which alteration should go, but I think that any alteration to be carried into effect, should be done with a very tender regard to expectant heirs; and I conceive that if the present law is ascertained to be an evil, expectant heirs ought not to demand that they shall suffer no injuries, but to be satisfied if this evil is removed with the least possible injury to them.

Would you be disposed to recommend an alteration of the existing law affecting expectant heirs with regard to the powers of leasing?—No; I do not consider that much importance would arise from any alteration of that; I think the powers of leasing are sufficiently ample.

You think then that the power of leasing given to the heirs in possession are sufficiently ample; and that they have sufficient facility to execute those powers under the different statutes that have been pased?—I conceive so; I think that nineteen or twenty-one years are in general sufficient for the execution of improvements.

Do you know whether there are many cases in which the powers given by the Act of 1770, would be considered as inadequate for the improvements required by the estate?—I would consider it in almost every case inadequate; I can scarcely conceive a case, in which it is adequate.

Do

Do you mean inadequate in amount?—In amount, and in the powers given, or the means of exercising them.

You imagine, that the entailed estates in Scotland are often in a condition, in which a burthen amounting to four years rent of the estate, is not sufficient to execute the advisable improvements?—I do consider that in many cases, four years rent is not sufficient, and in almost all cases insufficient, when the difficulties of making it an available fund for improvement, are taken into account.

Rents having been falling of late years in Scotland, do you conceive that an entailed proprietor has the same inducement to make improvements that he had some years ago?—No; I conceive that in that situation the inducement to both entailed and unentailed proprietors to make improvements is diminished; I conceive, that the inducement to the entailed proprietors to do so, is more diminished, from the peculiar circumstances under which they are placed, than that of fee-simple proprietors.

Generally speaking, in cases in which a charge has been created for improvements under the Act of 1770, should you say that the character of the improvements was of a substantial description?—Not always.

Have you not known the privileges of that Act used rather to rear a debt at the disposal of the possessor, than to employ it for the permanent benefit of the estate?—I have no knowledge of any particular case except what I mentioned before; that I have known that mere objects of ornament of some kind, have been made a burthen against the succeeding heir.

And that ornamental improvement was not, in your opinion, beneficial to the fee-simple value of the property?—No.

On entailed estates, have you observed a strong disposition on the part of the tenants in possession to make improvements of a temporary nature, and which may only be useful during the currency of the lease?—Very frequently; I did not expect to be examined to-day, otherwise I should have produced some documents shewing that.

Can you give the Committee a general explanation of your views as to the effects produced by those causes upon entailed properties, relatively with unentailed properties?—The effect is certainly extremely injurious, as regards entailed property.

Could you give any example of the manner in which it operates?—I will suppose, that certain buildings are necessary to be erected upon an entailed estate, the burthen of doing this is thrown upon the tenant; all that the proprietor may want and frequently does want, is to be relieved of the present burthen; they are consequently done in the most superficial manner by the tenant, and they frequently will not endure beyond the lease; cases of that kind frequently come under my observation.

When similar improvements are required upon an unentailed property, how are the parties in the habit of proceeding?—In the case of an unentailed property, the parties may sometimes proceed in the same way; I have known instances of it but rarely. In general either the burthen of the building is taken upon the proprietor, or the tenant is bound to execute it in a particular manner.

Are the improvements in such cases in general, of a more substantial nature than in the case of unentailed properties?—Generally more substantial.

In your experience, have you known many cases in which the heirs in possession have committed much waste upon estates?—Yes, I have known such cases.

Have you known timber cut in such quantities as to injure the estate?—Yes.

Have you known plantations made for the purpose of being cut down within the life of the heir in possession?—I scarcely conceive there is inducement to do so, as during the probable period of the life of an heir in possession, young wood can scarcely attain the age and value of timber.

Are you aware of many instances of very small properties subject to Entail?—Yes, I had occasion lately to assist in the purchase of property under 15,000*l.* value that was to be entailed.

Do you know instances of single houses being subject to Entail?—I have heard of such instances, but they have not come under my own knowledge.

If by the remodeling of the law of Entail, you suppose that a greater quantity of land might come into the market, do you think that the value of land in Scotland would be materially decreased?—I do not think so.

You stated, that you had known instances of tenants under Entail in possession leaving an estate to their successors; from your intercourse with heirs in pos-

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session and substitutes in remainder, have you come to any conclusion whether the law of Entail in Scotland leads to amity between father and son, or the contrary?—I should feel some hesitation in speaking from my own knowledge, but I should certainly draw the inference that the law of Entail tends to diminish the force of parental influence, and so in some cases may produce an injurious effect.

Does it not also, while it diminishes parental authority, produce jealousy on the part of the next heir?—I should conceive also that such a feeling may be produced.

How can it produce jealousy, when the next heir is sure to possess the estate?—I should perhaps not have used the word jealousy, I should rather say feelings of indifference or unkindness; my observations however are chiefly directed to estates where the Entail passes to a distant branch.

Does it often happen that on entailed estates the estate is denuded of its timber before it has arrived at its maturity?—Yes, I can mention one case, and it is a case which may be mentioned, because it is known to the public, the case of the late Duke of Queensberry, he demolished his timber in many parts; I particularly refer to the case of the Castle of Neidpath, where he cut down woods and saplings; I understand he was beseeched by the adjoining proprietor to spare those beautiful woods.

Do you know any other case?—I know other cases where wood has been cut down which ought not to have been cut down.

Is there anything in your knowledge in the law of Scotland, to prevent the tenant under Entail in possession committing every species of waste that he can devise?—I am unable to answer legal questions.

From your experience, do not you think that there is a great temptation to a proprietor of entailed property, from the restrictions under which his property lies, to commit waste for his own immediate advantage?—I think a very considerable temptation.

Do you know any other instance of such waste but that you have mentioned?—Yes.

Does your observation regarding waste, apply particularly to the cutting of wood?—Very much to the cutting of wood.

Does it apply also to acts omitted as well as acts committed?—Certainly to acts omitted.

Is the heir of Entail in possession restrained by the common law of Scotland from letting leases upon terms of management which tear the heart out of the land itself?—I am not aware that he is prevented from doing so.

Is there anything you know which restrains a proprietor under strict Entail from letting a farm for seven years, without any conditions of management?—I am not aware of the thing.

Is it not customary in Scotland now to prescribe a certain mode of culture for the last five or six years of the lease?—It is general.

A tenant in possession it is presumed would derive somewhat more of revenue from a farm let without any covenants of management, than he would from a farm let under strict covenants with respect to the mode of culture?—He might in certain cases.

Can you state any case in which such a course has been pursued?—In a case within a very few days I have seen such a lease of an entailed estate, in which there was an omission of several important and customary obligations, and in particular of one to keep up the fences.

Have you not known similar cases occur in leases granted by unentailed proprietors?—I certainly have.

Do not you consider that an entailed proprietor has a temptation which an unentailed proprietor has not, to procure as much out of the land as he can during his being proprietor of it?—I do.

May not an unentailed proprietor either sell the land or rob it, whereas an entailed proprietor can only rob the land and cannot sell it?—A proprietor of an unentailed estate may injure the land and sell; a proprietor of an entailed estate may injure the land and cannot sell.

In which case is the temptation greatest to injure?—In the case of the entailed proprietor, generally speaking.

Is not it the case in cases of Entail, that the interest of the proprietor and the interest of the estate are at variance?—Frequently.

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Is not it frequently the case, that the proprietor sacrifices the estate to his own individual interest?—Yes.

Supposing the case of a proprietor of an entailed estate arrived at a time of life, at which he has not much prospect of looking forward beyond nineteen years, and with a family of daughters to whom his property is not to descend; would it not be very strongly that proprietor's interest to raise the rent to the very highest pitch, even at the risk of doing permanent injury to the land?—I conceive that in many cases it would.

Do not you conceive that in such cases it must always be a very strong temptation to the proprietor?—Yes; there is always a strong temptation to raise the rents as high as possible.

Do not cases frequently occur where entailed estates are conveyed to trustees to be managed for a period?—Yes.

What is the effect of a trust upon the system of management of an estate in general?—I should say, in general injurious: It is the duty of a trustee to take all he can from the estate, it is not his duty to look forward to improvements of which the return is distant.

Is there consequently an immediate interest created totally at variance with the ultimate and permanent interest of the estate?—There is.

Does an estate in those circumstances actually pass by title into the possession of another for the time being?—Yes, I conceive so.

Do you consider that the law of Entail tends, from its effects, frequently to occasion trusts which would by no means take place if the same land were held in fee-simple?—I conceive that it does.

Are you aware that trusts are very common in England?—I understand that they are very common in England.

Has there been of late years much disposition to lay out money in improvements either by entailed or by unentailed proprietors in Scotland?—I think of late years there has not been much disposition.

Does that arise from rents having of late years been on the decline?—I conceive so.

If that cause should continue to operate, do you conceive that entailed proprietors will require those facilities that you have been adverting to, for the purpose of improving their lands?—Yes; I think facilities will be more and more necessary, or rather indispensible, if we are not to see the improvement of many parts of the country stop altogether.

If persons have not a prospect of obtaining a return for their improvements, will they be induced to make them?—If they have no prospect of a return, they will not in general make them.

If rents continue on the decline, what inducement will they have to make improvements?—I can conceive very little inducement, if rents are to be constantly on the decline.

Was not the great inducement for entailed proprietors, to make improvements during that period of the war, when the demand for the articles produced became high, and when improvement was therefore induced by the prospect of high prices and rising rents?—Yes; improvements were very much excited by the prospect of high and rising rents.

Were not the Entails at that period found peculiarly inconvenient, from denying to proprietors under Entail the means of making improvements?—I conceive that entailed properties were not in so good a situation during the rise of rents as unentailed properties, as regarded the means of making improvements.

Then confining your view to the entailed proprietor, as regards the interest of the country with a view to improvement, if rents are not prospectively about to rise he may not require facilities for making improvements?—He will in that case require facilities to prevent his estate from becoming worse if rents are not to rise, or if they are to continue falling.

While high prices in the war time promoted, perhaps, in some cases, injudicious improvements, may not improvements frequently be executed even under lower prices, of a judicious character, and such as would confer an additional value on the estate?—Certainly. I do not imagine that the mere fact of low prices precludes improvements; I understood the preceding question to allude to a declining state of prices.

Do you think that the want of improvement has arisen quite as much from the unsteadiness of prices as from the lowness of them?—Chiefly from the fall of prices.

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Do you consider that the fall of rents is likely more materially to affect the interests of entailed or of unentailed proprietors?—I should say, without any hesitation, it is more calculated to affect the interests of entailed proprietors.

And consequently tends, in a great degree, to deteriorate their condition in society?—Certainly.

While on the other hand, a rise of rents gives no greater advantage to the entailed than to the unentailed proprietor?—No.

Is not the balance of advantage, therefore, clearly on the side of the unentailed proprietor, with respect to the fluctuation of rents?—It is.

In those cases which you referred to in Scotland, in which improvements have been carried to a great extent on certain entailed estates; could you state from your own knowledge, whether the proprietors of those estates derived revenues from other sources, or, whether their revenues were derived principally from the estates so improved?—In some cases I know they were derived from other sources, in others from the estate alone.

Patrick Cockburn, Esquire, again called in; and further Examined.

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THE Committee understand that you have had considerable share in preparing the provisions of the Bill now before the Committee, with reference to disentailing entailed estates, in certain proportions?—I have.

Have you prepared any calculations which would inform the Committee, with respect to the effects of such provisions upon the interests of substitute heirs of Entail?—Yes; I have prepared a Statement to shew what the effect of the proposed alteration upon the interest of existing substitutes would be, supposing the estate were disentailed by thirds.

Will you have the goodness to deliver it in?

[*The Witness delivered in the same, which was read as follows:*]

N° I.

STATEMENT shewing the probable effect of the proposed alteration of subsisting ENTAILS, on the Interest of the Substitutes.

SUPPOSING the value of perpetuity 25 years free rent of the estate, and that *A.* the heir in possession, and *B.* and *C.* the two heirs who next come successively into possession, are each allowed to disentail $\frac{1}{3}$d of the estate.

CASE, 1st.

Let the ages of *A.* the heir in possession, and of *B. C. D.* and *E.* the presumptive heirs in existence, next in the order of succesion, be as follows:—

A. - -	70.	*D.* - -	10.
B. - -	50.	*E.* - -	8.
C. - -	30.		

And let it be assumed, that no intervening lives shall come into existence to intercept the succession of *B. C. D.* and *E.* and that each of these substitutes shall actually come into possession in their order. Then

1st.—The ages when the substitutes will probably come into possession, will be found thus: taking the expectations of life according to the Northampton Tables.

		Years.
To find the age of *B.*	The expectation of *A.* aged 70, is - - -	9
	To which add present age of *B.* - - - -	50
	Age of *B.* when he comes into possession -	59
	Provided he survive *A.*	
To find the age of *C.*	The expectation of *B.* at the age of 59, is -	14
	To which add the period of *A's.* possession - -	9
	And the present age of *C.* - - - - -	30
	Age of *C.* when he comes into possession -	53
	Provided he survives *A.* and *B.*	
To find the age of *D.*	The expectation of *C.* aged 53, when he comes into possession, is - - - - - - -	16
	To which add the possession of *A.* and *B.* 9 + 14 -	23
	And the present age of *D.* - - - - -	10
	Age of *D.* when he comes into possession -	49
	Provided he survives *A. B.* and *C.*	

To find the age of *E*. The expectation of *D*. aged 49, when he comes into possession, is - - - - - - - - Years. 18

To which add possession of *A*. *B*. and *C*. viz. 9 + 13 + 16 - - - - - - - - 38

And age of *E*. - - - - - - - - 8

Age of *E* when he comes into possession - 65

Thus the present ages, the time that would probably elapse before the substitutes respectively come into possession under the Entail, and their ages at that time in the supposed case, would be as follows:

	Present Ages.	Years deferred.	Ages at Accession.
B.	50.	9.	59.
C.	30.	23.	53.
D.	10.	39.	49.
E.	8.	57.	65.

2d.—The comparative values of the interests of the substitutes under the Entail, and under the proposed System as *at the respective periods of their accession*, according to the Northampton Tables, at 4 per cent. may be found thus:

B's Interest.

		Years Rent.
By Entail, - -	*B*. would enjoy the life-rent of the whole, which at 59, is worth - - - - - - - -	9.28
By new System	*B*. would enjoy perpetuity of $\frac{1}{3} = \frac{25}{3} =$ - -	8.33
	And life-rent of $\frac{1}{3} = \frac{9.28}{3} =$ - -	3.09
		11.42
	Difference in favour of *B*. at period of his accession	2.14

C's Interest.

By Entail, - -	*C*. would enjoy the life-rent of the whole, which at 53, is - - - - - - - - -	10.64
By new System,	*C*. would enjoy perpetuity of $\frac{1}{3} = \frac{25}{3} =$ - -	8.33
	Difference against *C*. at the period of his accession	2.31

D's Interest.

By Entail - -	*D*. would enjoy life-rent of the whole, which at 39, is	13.37
By new System,	*D*. would be cut off - - - - - - -	0.
	Difference against *D*. at time of accession -	13.37

E's Interest.

By Entail, - -	*E*. would enjoy the life-rent of the whole, which at 65, is - - - - - - - - -	7.761
By new System,	*E*'s interest is cut off - - - - - - -	0.
	Difference against *E*. at the time of accession -	7.761

It will be observed that the foregoing values are calculated at the periods when the substitutes *B*. *C*. *D*. and *E*. respectively *get into possession*, and upon the supposition that each shall survive *A*. the heir in possession, and the substitutes who are before them in the order of succession, and also upon the supposition that no intervening heirs come into existence.

3d.—To find the *present* Values of the differences.

It is evident that if the values be calculated as *at present*, and as depending upon the contingencies of *B*. *C*. *D*. and *E*. respectively surviving those who precede them, the values would be greatly reduced. It would be very difficult to calculate the exact value of the life-rents, depending on the chances that *A*. shall die first, *B*. second, *C*. third, *D*. fourth, and *E*. last, which are the conditions of the problem for ascertaining the value of the differences between the values of the life-rents under the present and the proposed systems.* But an approximation (probably favourable to the substitutes) may be obtained, by multiplying the several values of the life-rents at the ages when they will probably come into possession as already

* That these are the conditions of the problem is evident from this circumstance, that if *B*. die before *A*., *C*. comes into the place of *B*., and *D*. into the place of *C*.; and if both *C*. and *D*. die before *B*., *E*. comes into the place of *C*.

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already found, by the chance of their attaining those ages, and by the value of 1 *l.* to be received at the end of a term of years equal to the time of their being kept out of possession as before computed, or what is the same thing by finding the value of annuities deferred for these respective periods.

Proceeding upon this principle, the present value of the differences depending upon the before-mentioned contingencies, will be found thus:—

1st.—Difference in favour of *B.* aged 50, depending on *B.* surviving 9 years:

$$2.12 \times \frac{2120}{2857} \times .7025 = 1.051$$

2d.—Difference against *C.* aged 30, depending on his surviving 23 years:

$$2.31 \times \frac{2612}{4385} \times .4057 = .5582$$

3d.—Difference against *D.* aged 10, depending on his surviving 39 years:

$$13.37 \times \frac{2936}{5675} \times .2166 = 1.4983$$

4th.—Difference against *E.* aged 8, depending on his surviving 57 years:

$$7.761 \times \frac{1632}{5815} \times .1069 = .2328$$

Thus it appears that *B.* is benefited by the change, and that the present value of the loss suffered by *C.* and *E.* is extremely small, being the fraction of a year's free rent of the estate. The value of the loss sustained by *D.* is $1\frac{1}{2}$ years rent, but then that proceeds upon the supposition that lives do not intervene by new births to intercept the succession. If *B.* or *C.* should eventually have issue, then the value of the loss to *D.* and *E.* would become unsusceptible of calculation and entirely vanish.

CASE, 2d.

Let the ages be as follows:

A.	50.	*D.*	10.
B.	20.	*E.*	8.
C.	16.		

1st.—To find the ages of the substitutes when they come into possession.

		Years.
To find the age of *B.*	The expectation of *A.* aged 50, is	18
	To which add present age of *B.*	20
	Age of *B.* when he comes into possession	38
	Provided he survive *A.*	
To find the age of *C.*	The expectation of *B.* at the age of 38, is	24
	To which add the period of *A*'s possession	18
	And the present age of *C.*	16
	Age of *C.* when he comes into possession	58
	Provided he survive *A.* and *B.*	
To find the age of *D.*	The expectation of *C.* at the age of 58, is	14
	To which add the possession of *A.* and *B.* 18 + 24	42
	And the present age of *D.*	10
	Age of *D.* when he comes into possession	66
	Provided he survives *A.* *B.* and *C.*	
To find the age of *E.*	The expectation of *D.* at the age of 66. is	10
	To which add possession of *A.* *B.* and *C.* 18 + 24 + 14,	56
	And the present age of *E.*	8
	Age of *E.* when he comes into possession	74
	Provided he survives *A.* *B.* *C.* and *D.*	

Thus the present ages, the time which would probably elapse before the substitutes respectively come into possession, and their ages at that time, in this case would be as follows:

	Present Ages.	Years deferred.	Ages at accession.
B.	20.	18.	38.
C.	16.	42.	58.
D.	10.	56.	66.
E.	8.	66.	74.

2d.—To

2d.—To find the comparative values of the interests of the Substitutes under the Entail, and under the proposed system, as at their respective periods of their coming into possession.

	Years' Rent.
By Entail, - *B.* would enjoy life-rent of the whole, at 38, is - -	13.548
By new System, *B.* would enjoy perpetuity of $\frac{1}{3} = \frac{25}{3}$ - -	8.333
And life-rent of $\frac{1}{3}$ = - - - - -	4.516
	12.849
Difference against *B.* at period of his accession -	.699

C.'s Interest.

By Entail, - *C.* would enjoy life-rent of whole, at age of 58 - -	9.516
By new System, *C.* would enjoy perpetuity of $\frac{1}{3} = \frac{25}{3}$ - - - -	8.333
Difference against *C.* at the period of his accession -	1.183

D.'s Interest.

By Entail, - *D.* would enjoy the life-rent of the whole, at 66 - -	7.488
By new System, *D.* would be cut off - - - - - - - -	0.
Difference against *C.* at the period of his accession -	7.488

E.'s Interest.

By Entail, - *E.* would enjoy life-rent of the whole, at 74 - -	5.230
By new System, *E.* would be cut off - - - - - - - -	0.
Difference against *E.* at the period of his accession -	5.230

3d.—To find *present* Values of the Differences.

1st.—Difference in favour of *B.* aged 20, depending on his surviving 18 years:

$$.699 \times \frac{3785}{5132} \times .4936 = .2545.$$

2d.—Difference against *C.* aged 16, depending on his surviving 42 years:

$$1.183 \times \frac{2202}{5373} \times .1925 = .0933.$$

3d.—Difference against *D.* aged 10, depending on his surviving 56 years:

$$7.488 \times \frac{1552}{5675} \times .1112 = .2279.$$

4th.—Difference against *E*, aged 8, depending on his surviving 66 years:

$$5.32 \times \frac{912}{5815} \times .0751 = .0626.$$

Thus it will be observed, that in this case the eventual interest of *B.* the first substitute, is increased, and the eventual loss of *C. D.* and *E.* respectively, when reduced to its present value, is a mere trifle, and if effected by the chance of intervening heirs, descended of the preceding substitutes, it would become totally imperceptible.

General Observations.

1. The most probable supposition, according to the rate of mortality in the community, is, that upon an average, each heir in succession comes into possession at the age of 33, lives 27 years, and dies at the age of 60, and that the average age of the heirs now in possession, is 50 or 51. Proceeding upon this supposition, the period after which the third heir will probably enter into possession, will be found thus:

	Years.
The expectation of life, or the period of possession of *A.* the heir now in possession, aged 50, is - - - - - - -	18
The expectation of *B.* the next heir - - - - - - -	27
The expectation of *C.* the next heir - - - - - - -	27
Total - - -	72

So the probability is, that upon an average *D.* the third heir from the present possessor, who succeeds under any existing Entail, will not enter into possession until after the lapse of 72 years.

2. From the foregoing Statements it appears, that in the cases assumed, the present value of the life-rent interest of any one substitute now in existence, after the two first who get into possession, under the Entail, is very small: and while this is the case, it also appears, that whatever may be the *present* value of the life interest of any remote substitute, yet if

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he happens to be the first or second who gets into possession, his eventual interest, according to the proposed alteration, will be very nearly equivalent to his eventual interest under the Entail.

3d. With regard to the heirs *nascituri*, who would have succeeded under the Entail system, after the death of the two first substitutes; as the restraints on the disposal of property authorized by the statute 1685, will be removed, and their chance of succession under the provisions of that statute, modified or taken away *before they come into existence*, it is evident, that in so far as heirs yet unborn are concerned, no expectation of such heirs will be violated by the proposed change.

4th. One great obstacle that has always been opposed to the doing away the system of strict Entails, is the difficulty of estimating the compensation that it was thought necessary to make to the existing substitutes. To calculate the *present value* of the expectations of all the substitute heirs of Entail in existence, would be a most hopeless task, and far beyond the reach of any science to which the efforts of political arithmeticians have attained, or ever may attain. The plan of gradual disentailing successive portions of the estate, has this advantage, that it does not profess to give *present* compensation, but that the compensation (which consists of the power of converting a portion of the estate into a fee simple) is made to depend on the *event of succession*.

The estate is not divided among all the heirs *in expectation*, according to their several probabilities of coming into possession, but among the present heirs, and the two heirs who *de facto come first into possession*; and all that is necessary is, to compare the value of the life-interest taken away, with the additional value of the fee simple interest created, as at the time of their coming into possession, which has been done in the foregoing cases.

Pat. Cockburn.

Have you any calculations shewing what the effects would be, supposing an entailed estate to be disentailed in different proportions?—Yes; I have made out a Statement, supposing it to be disentailed by fourths; and another, supposing the heir in possession and the next heir, each to disentail one-fourth, and the third heir to disentail the remaining half; and with the permission of the Committee, I will deliver in these Papers.

[*The Witness delivered in the same, which were read, as follows:*]

N° II.

STATEMENT shewing the probable effect of the alteration of subsisting ENTAILS, on the Interest of the Substitutes.

SUPPOSING the value of the perpetuity 25 years rent of the estate, and that *A.* the heir in possession, and *B. C.* and *D.* the three heirs or substitutes who next come successively into possession, are each allowed to disentail *one-fourth* part of the estate.

Let the ages of *A.* the heir in possession, and of *B. C. D.* and *E.* the presumptive heirs in existence next in the order of succession, be as in the Statement, N° I. as follows:—

A.	70.	*D.*	10.
B.	50.	*E.*	8.
C.	30.		

Then upon the same assumption as in Statement, N° I. that no intervening heirs shall come into existence to intercept the succession of *B. C. D.* and *E.* and that each of these substitutes shall actually come into possession in their order, the present ages, the time that would probably elapse before the substitutes come into possession, under the Entail, and their ages at that time would, according to the Statement, N° I. be as follows:—

	Present Ages.	Years deferred.	Ages at Accession.
B.	50.	9.	59.
C.	30.	23.	53.
D.	10.	39.	49.
E.	8.	57.	65.

2d.—The comparative values of the interests of the Substitutes under the Entail, and under the proposed alteration, as at the respective periods of their accession, would be found thus:—

B.'s INTEREST.

		Years Rent.
By Entail,	*B.* would enjoy the life-rent of the whole, which at the age of 59, is worth	9.28
By new System,	*B.* would enjoy perpetuity of $\frac{1}{4} = \frac{25}{4} =$	6.25
	and life-rent of $\frac{1}{2} = \frac{9.28}{2} =$	4.64
		10.89
	Difference in favour of *B.* at the period of his accession	1.61

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C.'s Interest.

		Years Rent.
By Entail, -	*C.* would enjoy the life-rent of the whole, which at 53 is worth - - - - - - - - -	10.64
By new System,	*C.* would enjoy perpetuity of $\frac{1}{4} = \frac{25}{4} =$ - -	6.25
	and life-rent of $\frac{1}{4} = \frac{10.64}{4} =$ - -	2.66
		8.91
	Difference against *C.* at the period of his accession -	1.73

D.'s Interest.

By Entail, -	*D.* would enjoy life-rent of the whole, which at 39 is -	13.37
By new System,	*D.* would enjoy perpetuity of $\frac{1}{4} = \frac{25}{4}$ - - -	6.25
	Difference against *D.* at the time of his accession -	7.12

E.'s Interest.

By Entail, -	*E.* would enjoy the life-rent of the whole, which at 65 is	7.761
By new System,	*E.*'s interest is cut off - - - - - - -	0
	Difference against *E.* at the time of his accession -	7.761

It will be observed, that the foregoing values are calculated as at the periods when the substitutes *B. C. D.* and *E.* respectively *get into possession*, and upon the supposition that each shall survive *A.* the heir in possession, and the substitutes who are before them in the order of succession, and also upon the supposition that no intervening heirs come into existence.

Upon the principles evolved in the State, N° I. the present value of the differences is found thus:—

Difference in favour of *B.* aged 50, depending on his surviving nine years.

$$1.61 \times \frac{2160}{2857} \times .7025 = .8545$$

Difference against *C.* aged 30, depending on his surviving 23 years.

$$1.73 \times \frac{2612}{4385} \times .4057 = .323$$

Difference against *D.* aged 10, depending on his surviving 39 years.

$$7.12 \times \frac{2936}{5675} \times .2166 = .869$$

Difference against *E.* aged 8, depending on his surviving 57 years.

$$7.761 \times \frac{1632}{5815} \times .1069 = .2328$$

Thus it appears that *B.* is benefited by the change, and that the present value of the loss suffered by *C. D.* and *E.* is extremely trifling, being less than a year's free rent of the estate; and that even upon the supposition that lives do not intervene by new births to intercept the succession. If *B.* or *C.* had issue, then the value of the loss to *D.* and *E.* would become unsusceptible of calculation, and entirely vanish.

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N° III.

STATEMENT shewing the probable effect of the alteration of subsisting Entails, on the Interest of the Substitutes.

Supposing the value of the perpetuity 25 years rent of the estate, and that *A.* the heir in possession, and *B.* the next heir who comes into possession, each disentails a fourth, and that *C.* the third heir who comes into possession, is allowed to disentail the remaining half of the estate.

Let the ages of the parties be as in Statement, N° II.; viz.

A. - -	70.	*D.* - -	10.
B. - -	50.	*E.* - -	8.
C. - -	30.		

B.'s Interest.

	Years Rent.
The difference *in favour* of *B.* would be as in Statement, N° II. -	1.61

C.'s Interest.

By Entail, -	*C.* would enjoy the life-rent of the whole, which at 53 is	10.64
By new System,	*C.* would enjoy perpetuity of $\frac{1}{2} = \frac{25}{2} =$ - - -	12.50
	Difference *in favour* of *C.* at the time of accession -	1.86

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D.'s Interest.

		Years Purchase.
By Entail,	*D.* would enjoy life-rent of the whole, which at 39 is worth	13.37
By new System,	*D.* would be cut off - - - - - - - - -	0
	Difference against *D.* at the time of his accession -	13.37
	And the present value of this difference, calculated upon the principles stated in N° I. is, $13.37 \times \frac{2936}{5675} \times .2166 =$	1.498

E.'s Interest.

By Entail,	*E.* would enjoy life-rent of the whole, which at 65 is -	7.761
By new System,	*E.* would be cut off - - - - - - - - -	0
	Difference against *E.* at the time of his accession -	7,761
	And the present value of this difference is as in Statement N° II. - - - - - - - - -	.2328

Thus it appears that both *B.* and *C.* are benefited by the change upwards of $1\frac{1}{2}$ years free rent of the estate, as at the time of accession.

The differences are against *D.* and *E.*, but when those differences are reduced to their present values, the former becomes equal to about $1\frac{1}{2}$ years rent, and the latter to about one-third of a year's rent of the estate.

It is always to be observed, however, that these values are calculated upon the supposition that the heir in possession and prior substitutes leave no issue. If the values were affected by the chance of intervening lives, they would become unsusceptible of calculation, and entirely vanish.

And lastly, it is to be considered that *D.* and *E.* and every other substitute, however remote, have some chance, by the predecease of the former substitutes, of coming into the place of *C.* the second substitute; so in that event the chance of every substitute is improved by this plan.

If the second case, stated in N° I. were taken, the results of the change would be still more favourable to the substitute heirs.

Pat. Cockburn.

(Mr. Cockburn.) I have another Paper, containing a Calculation I made some years ago, upon the principle of present compensation. At that time, Mr. Cranstown, now Lord Corehouse, was thinking of some measure of this kind, and I was requested to try and calculate the value of the expectation of substitute heirs of Entail; and this is the Paper in which I have tried to approximate to something of that kind. Of course, it is almost impossible to form any calculations of that kind, because the interests are so various and so contingent. It is intituled, "An attempt to calculate the approximate Value of the expectation of Heirs of Entail."

Was the time that you made that calculation at the request of Lord Corehouse, a period when Lord Corehouse had directed his attention to the law of Entail in Scotland, with a view of proposing an alteration, at the suggestion of Lord Eldon, the late Lord Chancellor of England?—I think it was.

Did Lord Corehouse, then Mr. Cranstown, apply to yourself and Mr. Selkrig, with a view to prepare this calculation?—Yes; I think either Lord Corehouse himself, or some person on his account.

[*The Witness delivered in the Paper, which was read as follows:*]

AN Attempt to calculate the approximate Values of the Expectations of Heirs of Entail.

1st Case.—Where the Heir in possession has a son of lawful age, and the Title is limited to Heirs Male.

A.—The heir of Entail in possession, aged 50.

B.—The eldest son of *A.*, unmarried, aged 25.

C.—The second son of *A.*, unmarried, aged 20.

D.—The third apparent substitute, married, and having issue, and supposing the estate to become a fee-simple in *D.* or his descendants in the event of their succession.

What is the value of the expectation of *B. C.* and *D*? calculating according to the Northampton tables at 4 per cent.?

1.—It

1.—It is evident that the interest of *A.* is a bare life-rent in the estate; and calculating the net annual returns of the estate at 4 per cent, the value of the perpetuity is 25 years purchase.

	£.
Hence the perpetuity being - - - - - -	25
And the value of a life 50 - - - - - - -	11.264
The value of the reversion is - - -	£. 13,738

that is the present value of the interest of *B.*, and all the future substitutes is about 13¾ years net rent of the estate, and this would be the interest of *B.* were the estate to become a fee-simple in his person.

2.—But the estate does not become a fee-simple in *B.*, and if *B.* is supposed to represent all his male descendants, his expectation consists of two parts; *first*, his own personal expectation; and, *secondly*, the expectation of his male descendants. It is easy to ascertain the value of *B*'s personal expectation, but not so easy to ascertain the value of that of his descendants; but an approximation may be found upon certain assumptions.

3.—The value of *B*'s. personal expectation is equal to the value of an annuity upon the remainder of his life after that of *A.* in the event of his survivance, and is found thus:—

	£.
Value of *B.*, aged 25, life in expectation - - - -	15.438
Deduct value of joint lives, *A.* and *B.*, *i. e.* joint lives, 25 and 50 - - - - - - - - - -	9.488
Value of *B*'s eventual life-rent - -	5.950

4.—Thus the value of *B*'s life-rent after *A.* is 5.95 years rent, and 5.95 being deducted from 13.738, the value of the reversion after the life of *A.* leaves 7.788, as the value of the reversion of the estate after the longest of the lives of *A.* and *B.*; and consequently the value of the interest of the male descendants of *B.*, and of the whole other substitutes is equal to 7.788 years rent.

5.—The chance of succession of the eventual male descendants of *B.* depends on the following events combined; *first*, that *B.* shall marry; *second*, that if married he shall leave male descendants, and the present value of the succession depends upon the value of the life-interests of all the probable male descendants of *B.*

6.—I do not know that any observations have hitherto been made upon the state of society from which the chance of marriage, and of leaving male descendants, can be calculated. But supposing for the sake of calculation, we were to assume the following data:—*first*, that two-thirds of all the persons living at the ages of 25 enter into the marriage state at some time or other; and *second*, that half of all such marriages leave one or more male children, then the chance of succession of male descendants of *B.* would be $\frac{2}{3} \times \frac{1}{2} = \frac{2}{6} = \frac{1}{3}$; and so upon the supposition, that the estate became a fee-simple in any male descendant of *B.*, who got into possession, the present value of the interests of all the male descendants of *B.* would be $\frac{1}{3}$ of the value of the reversion after the lives of *A.* and *B.*, that is (by article 4), $\frac{7.7\ 8}{3} = 2.596$. Hence the maximum value of the expectation of the male descendants of *B.*, upon the above supposition, would be 2.596 years net rent of the estate, and this being added to 5.950, the value of *B*'s eventful life-rent, the sum of 8.546 would shew the total value of the expectation of *B.* for himself and his eventual male issue.

7.—The value here found is upon the supposition, that if any of *B*'s. descendants get into possession, the line of succession will be carried on in his family to a perpetuity. It is possible, no doubt, that after getting into possession, and after enjoying the estate for one or more generations, *B*'s. male issue may become extinct, and the descendants of *C.* may get into possession. This chance is so remote, however, that the value of it may be disregarded, and the present value of the expectation of *C.* and the whole of his descendants and all the remoter substitutes will, upon the assumptions in the preceding article, be $\frac{2}{3}$ of the reversion after the lives of *A.* and *B.*, that is $\frac{2}{3}$ of 7.788 = 5.192.

8.—But the chance of the estate coming into the family of *C.*, who is supposed to be unmarried, depends upon the chance of his marrying and leaving male descendants, and taking these chances as before the expectation of *C.*, and his male issue becomes equal to $\frac{1}{3}$ of the reversion after the lives of *A.* and *B.*, and of all the probable male descendants of *B.*, *i. e.* (by Article 7) $\frac{1}{3}$ of 5.192 = 1.730. Hence while *B.* and *C.* remain unmarried, the value of the expectation of *C.* and his descendants becomes 1.730.

9.—Lastly, the expectation of *D.* and his descendants, and of all the remoter heirs of Entail for ever, upon the foregoing assumptions, is evidently equal to $\frac{1}{3}$ of the reversion which fell to be divided between him and *C*, *i. e.*, $\frac{1}{3}$ of 5.192 = 3.460.

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Hence upon the data and hypothesis that have been assumed, the values of the several expectations of the parties would stand thus :—

	Years Purchase.
The value of the estate or perpetuity being - - -	25
The expectation of *A.*, the heir in possession, aged 50, is -	11.264
Remainder - -	13.736
The expectation of *B.*, the eldest son, 25 - - - - -	5,950
Remainder - -	7,786
The expectation of the probable male issue of *B.* $\frac{7.786}{3}$ - -	2.596
Remainder - -	5.190
The expectation of *C.* and his probable issue $\frac{5.190}{3}$ - -	1.730
Remainder - -	3.460
The expectation of *D.*, the *last* substitute - - - -	3.460

OBSERVATIONS.

1.—If we suppose several other substitutes, *E. F. G.*, &c., then the division of the remainder may go on upon a similar rule, by giving each successive substitute $\frac{1}{3}$ of the remainder, until the last substitute who is entitled to the ultimate remainder, thus

	Years Purchase.
Remainder after *A.* and *B.* and *C.*, and the male issue of *B.* and *C.* as before - - - - - - - - -	3.460
Expectation of *D.* $\frac{3.460}{3}$ - - - - - - - -	1.153
Remainder - -	2.307
Expectation of *E.* $\frac{2.307}{3}$ - - - - - - -	.769
Remainder - -	1.538

and so on.

2.—The foregoing calculations proceed upon an assumed state of circumstances which is perpetually varying. In particular the substitutes *B.* and *C.*, have been supposed to be unmarried. But it is evident, if they were married or had children, the value of their expectations would be increased, and the interests of *D.*, the last substitute, proportionally diminished. If the rights of the substitutes were taken away by compulsion, then their compensation ought to be liberal, and it may be fair to calculate, as if *B.* were unmarried and had no issue at the time.

3.—The expectations also vary according to the ages of the parties. Thus I have found that calculating upon similar principles the values of the reversion, after deducting the expectation of *A.*, the heir in possession, and of *B.*, the eldest son, and of the descendants of *B.*, is as follows :—

Ages of *A.*	Ages of *B.*	Reversion.
50	25	5.190
55	30	5,759
60	30	6.988
55	25	5.401
65	35	6.632
65	40	7.104
		6) 37.074
	Average -	6.179

Hence it may be fair to assume six years rent as the average value of expectation of all the heirs of Entail after *A.* and *B.*, and the issue of *B.*

4.—And accordingly, if we suppose an Act passed, allowing a father and a son of lawful age to convert an estate-tail into a fee-simple estate, the indemnity to be given to the substitute heirs of Entail would stand thus :—

Total

	Years Rent.
Total indemnity	6
Which would be drawn thus:—	
1st.—By the younger sons of *A.*, and for themselves and their male issue	
C., the first substitute, draws for himself and his issue ⅓	2
Remainder	4
D., the *second* substitute, draws for himself and his issue ⅓	1.333
	2.666
2.—By *E.*, the brother of *A.* and his sons	
E. for himself	.888
Remainder	1.777
F., the eldest son of *E.*, for himself and his male issue ⅓	.592
	1.185
G., the second son of *E.*, for himself and his male issue ⅓	.395
Remainder	.790
And so on during the whole course of heirs in existence.	

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It is evident this rule would not suit all cases, but it may perhaps come as near to a fair estimate in the average number of cases as can be attained, and as the interest of the parties after the first and second substitutes becomes so very small, it is a matter of little consequence what rule be adopted, provided it has a semblance of equity in the generality of cases.

Martis, 25° die Martii, 1828.

THOMAS FRANCIS KENNEDY, ESQUIRE,

IN THE CHAIR.

David Low, Esquire, again called in; and Examined.

David Low, Esq.

25 March 1828.

DO you wish to explain any part of your evidence of yesterday, or to add any thing to it?—I attend by the desire of the Committee to give illustrations of the fact, that there existed a disposition in certain cases of entailed estates, to throw particular burthens upon the tenant.

Will you state the nature of the illustration you wish to make from the particular cases?—The first is from a report, by my father, made in the year 1795, in the case of an entailed estate in the county of East Lothian. His remark is, "Having thus stated how the estate is possessed and occupied at present, the reporter is to proceed to give his opinion relative to the arrangement of it into farms, and the future management; and in doing this the trustees will observe, that in obedience to his general instructions he is to avoid entering into *any views of remote improvement*, or proposing any plan that may directly lead to deterioration."

What is the value of the estate?—The value of the estate is now about 4,000*l.* a year. The next is a report of the same kind, of a pretty extensive estate in the north of Scotland, also by my father. The remark in the report is, "From the circumstances of the *estate being entailed*, and the farms steadings being in general the property of the tenant, a complete and proper arrangement would, no doubt, lead the landlord into a heavy expense at the outset, which the reporter takes for granted he would wish to avoid as far as possible. If, however, the estate could be burthened with what is called an oncast, or the allowances to be made to the tenants at the end of their leases for building and inclosing, &c. it would be far better that the landlord took them upon himself, obliging the entering tenants to keep up and leave in good repair what houses and fences they enter to on the farm." The next is the case of a very extensive estate in the north of Scotland, belonging to a most liberal and excellent landlord, and this is the general rule laid down in the case of houses and farm-buildings upon the estates. "The tenants at their entry to their houses shall be obliged to accept of them in the condition they may happen to be in, and to receive the timber of them, which belongs to the proprietor,

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at a fair valuation, and to pay the outgoing tenant any meliorations which they may be entitled to, and at their removal they shall leave the timber and houses of at least the same value they received it, and be entitled to receive from the proprietor or his incoming tenant the sum they paid to the outgoing tenant for meliorations," I merely give that as an instance, that this part of the burthen fell upon the tenants.

Is not that a very common arrangement all over the north of Scotland as to meliorations, that the burthen is always thrown upon the tenant?—It is a common arrangement. The next is a report from a factor to his employer, with respect to an estate in the west of Scotland. "It must also be observed, that a very heavy expense will not fail to be incurred in rebuilding and repairing farm-houses, the former possessors of the estate being only tenants for life" (by which he means that the estate was entailed), "were in the habit of making allowances in money to the tenants to provide themselves with accommodation, which has always been done in the cheapest and most superficial manner, and the consequence of that is, that a great proportion of the buildings are in a state of ruin." The last instance I shall mention, is one in which I myself was recently consulted in the case of an extensive property; and the enquiry was, in what manner the present outlay required upon the estate could be lessened. The remark which I made in my report is: "The throwing any material part of the present burthen of the buildings upon the tenant, is in its principle bad, and in its practical effects injurious. If the tenant calculates truly, he will make a full deduction for this in the rent he offers, so that the landlord will suffer in diminished income at least what he will save in present outlay; besides which the buildings themselves though executed, perhaps, at a less expense, will never be executed well by those who have only a temporary interest in them, and worse than all the effect is to trench upon the capital of the tenant, and diverting it from the cultivation of the land, to lessen his means of discharging his future obligations to the landlord."

That last observation, it is presumed, you would extend to other permanent improvements upon the estate, such as inclosing, ditching and draining; that to throw those upon the tenant to an unnecessary extent, of course you take away his capital that ought to be rather employed in the cultivation of his farm?—Yes; I must, perhaps, except here draining, which I consider to be an improvement that may properly fall upon the tenant. I believe in general the landlord executes it much better if he undertakes to conduct it upon proper principles.

James Murray M'Culloch, Esquire, called in; and Examined.

J. M. M'Culloch, Esq.

ARE you the proprietor of a landed estate in Scotland?—I am.

In what part of Scotland?—In the stewartry of Kirkcudbright, or the stewartry of Galloway.

Is that estate entailed?—It is.

During what period have you possessed that estate?—About thirty-two years.

During that period of possession, have you had occasion to form any opinion with respect to the tendency and effects of the law of Entail in Scotland?—Yes.

Will you be kind enough to state to the Committee what is the result of your experience on this subject?—One result of my experience on this subject, is the difficulty of raising money for the purpose of improving; I find a great difficulty in that.

Are you aware of an Act of Parliament of 10 Geo. 3, chapter 51, enabling entailed proprietors to burthen their estates to a certain extent for the purposes of improvement?—Yes.

Have you availed yourself of that Act?—Yes.

Have you found the provisions of the Act insufficient for the purposes you had in view?—No, I cannot say, as far as I have had occasion to avail myself of the Act, I have found the provisions insufficient; I have found them very intricate and very difficult to observe.

Have you, in point of fact, succeeded in constituting securities on your estate under that statute?—I have.

Have such securities fallen short of the amount you would have wished to have expended upon your property?—Yes; they have considerably.

Did you experience any difficulty in rendering such securities available under that Act of Parliament?—Yes, I found it very difficult.

Have you in point of fact succeeded?—Yes; I have succeeded as to borrowing money

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money to repay the money I laid out; I have succeeded in raising money, but not upon the Act itself, but by personal security along with it; I found it quite impossible to raise money without getting my friends to come forward and giving their personal security along with the money I had occasion to raise.

There are securities therefore upon that estate nominally, but which are in fact corroborated by personal security?—They are; I found it impossible to raise the money by the security which could be given by the Act of Parliament alone.

If you had not had friends who were willing in that way to assist you, should you have found it impossible to raise money for the purposes required?—Yes; I am experimentally convinced that I would have done so.

Have you been able to do justice to your estate, in your opinion, by such measures as you have been able to take for its improvement?—No, not to the extent or any thing like to the extent I would have wished.

Did you avail yourself of that Act to the full extent you could go?—No.

Was that because you found it so difficult to be complied with?—Yes, it was because I found it difficult so far as I had gone; I found that I could not raise money to go on.

With the aid of personal security to which you advert, have you been able to raise money at or under the legal rate of interest?—At the legal rate of interest.

Have you had occasion to resort to raising money by any other species of security, that of life insurance or an annuity rate of interest?—Yes.

Have you any objection to state at what rate you have been so obliged to raise it?

I have raised it upon the average at about 11 per cent.; but I may add, that I could not have raised it at any thing like so low a rate, had it not been that some of the policies of insurance were done upon my life at a time that I was much younger than I am at present.

Therefore you have enjoyed an advantage which a gentleman at your time of life could not command by insuring his life at this time?—Yes, I am experimentally convinced of that; because I have had occasion to go through another transaction lately; and the difference is about four per cent.

May the Committee ask what is your age?—Nearly sixty.

Had you now to commence raising money according to the recent transaction to which you allude, you must have paid about fifteen per cent?—Just about that; rather if any thing a little more, but not sixteen per cent.

Is the effect of such transactions as you mention you had occasion to enter into, very much to interfere with your present comfort in the enjoyment of your estate?—Yes, very much.

Do you consider that the money which you have either expended or would wish to expend upon your estate, was calculated or would be calculated to confer an additional permanent value upon it?—Yes, a great additional value upon it.

Such value as would make it descend as an increased and more valuable inheritance to your heir?—Yes.

Is that an Entail which carries the estate to heirs male?—To heirs male, not exclusive of females; but to heirs male in the first place, and then to my own daughters, in preference to the daughters of an elder brother.

Have you had occasion to advert to the Act of Parliament which passed in 1824?—Yes.

Have you availed yourself of that statute?—Yes, to a certain extent; but to a moderate extent.

Did you find that the having resorted to the statute of 10 Geo. 3, previously interfered in your estimation, with the exercise of the powers of the Act of 5 Geo. 4?—Yes, I did, so far as I was a judge myself; my agent or legal adviser found considerable difficulties; I would not like to give an answer to the question exactly upon my own judgment as I am not a lawyer.

Supposing that your heir comes into possession of the estate, can you state what portion of the whole income would be free income in his person, taking into view what you may have had occasion to do under those statutes?—About two fifths.

Is it your opinion that the state of the law of Entail in Scotland calls for the consideration of the legislature?—It is.

Do you think that such opinion exists, in general, in Scotland, among gentlemen with whom you are connected, and in a similar station of life with yourself?—Yes, I know it to be the general opinion. Those in a higher station I have had no opportunity of conversing with upon the subject.

Are there many entailed proprietors in your neighbourhood?—A great many.

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Do you believe that, generally speaking, they experience similar difficulties with yourself?—I know some who do; but I only know that from common report, but I have reason to believe it is the case.

Are there many estates in Galloway of moderate amount?—A great many; the county is very much divided. There are no very large estates in the county.

Do you consider that the law of entail is more injurious where the property is of moderate amount, than if it is so large as to confer a great wealth upon the individual possessing it?—I think, on a moderate estate, that the law of Entail is, perhaps, not so injurious, because the proprietors of such estates have more command of their living than those have who are in a higher station in society. I mean estates of 2,000*l.* a year, or perhaps 3,000 a year. We call a large estate in our country, about 10,000*l.* a year.

When you speak of an alteration of the law of Entail, do you mean an entire abolition of Entail, or a certain relaxation of the existing law with reference to existing Entails, and a general modification of the law in all time coming?—I would not consider an abolition of Entails proper. I think a modification of them would be attended with great benefit to the country, but I would wish to see no abolition; and I would wish to see any change that might take place, to be a change of a gradual description.

Should you wish such change to embrace a regulation of the system for the future, and relief administered under existing circumstances, to a moderate extent?—I would wish relief to be given under certain circumstances, to a moderate extent, to the present incumbents, and to be modified in such a manner, that the heirs of Entail might not suffer.

Do you mean, that any modification which might take place, should tend to abolition in future, according to your view of what is beneficial to the country?—Yes.

To the abolition of the Act of 1685?—I shall not say, to the abolition of the Act generally, as to all entailed proprietors in Scotland, but as to most of them. I shall not take upon me to speak as to what might be expedient or proper, as far as the highest classes of society are concerned; but I think, as to such people as myself, and to those in a subordinate class of landholders, generally speaking, it would tend very much to the benefit of Scotland.

You except the higher ranks?—I do not except them, but I would not like to speak as to them, because I consider myself not qualified to do so.

You conceive that that may involve other considerations of a political character, into which you do not think it right to enter?—I think it may involve a question of a constitutional nature, which I do not feel myself qualified to answer.

But your practical experience with landholders of the description you have alluded to, leads you to entertain no doubt, that both prospectively and retrospectively, some change or modification is required?—No doubt at all.

You said, that you had burthened your property, to the extent of leaving two-fifths clear to your heir?—My heir would succeed to two-fifths clear, and he would then have no more, for a long time.

You did not exercise the full extent of the power you might have exercised?—Not nearly.

Was it compassion for your heir that restrained you from exercising it?—It was compassion for my heir.

How do the two-fifths he will inherit stand in value, the condition of your estate, as it now is, being taken into consideration, contrasted with what he would have inherited, had you not improved your property?—I do not believe he would have had half so much as the two-fifths, if I had not improved my property.

Had he inherited it unincumbered, but unimproved, he would not have succeeded to so much as he will now, though that is only two-fifths of the clear rent?—He would not have succeeded to so much.

If you and your next heir had had the power of raising money upon heritable security, for the improvement of your estate, whereas you are now paying eleven per cent upon the money you raised, not on heritable security, you would have had only at this moment to pay five per cent, or somewhat less?—Yes, or the usual interest at the time.

Have you heard that the law of England is this, that in certain positions of a family, the heir of Entail in possession, and his next heir, are capable of getting rid of the Entail, and making a new arrangement suitable to the circumstances of the family?—I have heard so.

If a similar arrangement were to be extended to landed property in Scotland, do you conceive that would be an arrangement that would be agreeable to the landed proprietors, and at the same time beneficial to the country?—I would not like to give a positive answer to that question, because it requires a little study; but I rather think that would amount to an abolition of Entails. *J. M. M'Culloch, Esq.* 25 March 1828.

Would it not be in the power, and would it not be the interest of your next heir, in case of getting rid of the Entail, to insist upon your re-entailing the estate again?—I do not think it would, because, if I re-entail the estate again, he would be absolute master of no part of it.

He would be tenant for life again, but you might make such arrangements as would be beneficial to him?—I cannot answer that, because I am not a lawyer, and I know nothing, at any rate, of the English law upon Entails; and not having exercised my judgment upon the question, I would not like to give any opinion upon it.

Being conversant with the value of land, what is the general result of your observation as to the comparative state of culture of entailed estates and unentailed estates, in your neighbourhood?—The result of my observation upon that subject is, that entailed estates of a moderate extent, have been generally pretty well improved. The cause of that has always occurred to me to be the desire, that a proprietor has to raise himself in the scale of society, by possessing an estate of 3,000*l.* a year, instead of 1,500*l.* I think again, that in very large estates, the estate has not been generally so well improved; and I think the cause of that has been, that the proprietors of very large estates have found their revenues abundant, without giving attention to the improvement of their estates.

Was not the date of the commencement of the improvement of those smaller estates, the period of war prices and high rents?—Yes, generally speaking.

Since the war prices have ceased and rents have fallen, is not the culture going back upon those estates?—Very much; the spirit of improvement is not only damped, but entirely suppressed.

Have you experienced the difficulty of reducing rents, under Entail?—I have. I have experienced no inconvenience, because if I cannot get one rent, I may take another; my Entail does not prescribe any terms in that respect; some Entails do. All that my Entail prescribes is, that if I take grassums, I must not let my lands at a cheaper rate than they were previously let at, excepting there has been a general fall in the country in the price of land; except it can be proved that I could get no more for it, without taking a grassum.

You are aware, that grassums are no longer permitted?—I am aware of that, in consequence of the Queensberry decisions.

Has not that inceased the difficulty of the position of heirs under strict Entail?—I do not think so; I think that if an Entail is to exist at all, there ought to be no permission to take grassums.

Was not that permission of taking grassums *pro tanto*, a power of raising money on the part of the heir in possession?—Yes.

Is he not deprived of that now?—He is deprived of that; and if I may be permitted, I should say, very properly.

Whether rightly or wrongly, has it diminished and crippled the means of an heir under strict Entail of commanding capital?—It has.

And it has increased the means of the heir in remainder?—It has prevented money from being raised at an enormous interest, to the prejudice of the estate.

Though your Entail contains no clause prohibiting the reduction of the rents below the rents at the time of the Entail, do you know in your neighbourhood of Entails so prohibiting reduction, even Entails made during the period of war prices and high rents?—Yes, I know such instances; I have reason to believe there are many such instances; but if necessary, I could give a very well authenticated one. I attended a meeting of the entailed proprietors, at the Waterloo Tavern, at Edinburgh, in May last, and Sir James Ferguson, of Kilcarren, was our Preses, and he stated the very great inconvenience which he felt in consequence of one of the irritant clauses of his Entail, whereby he was prevented when the lease was out, from letting his land in any other way than by public roup; and hence he was obliged to receive any tenant who might bid, no matter how worthless he might be either as to capital or to moral character.

Can you doubt that such a state of affairs must lead to a rapid deterioration of the value of the estate so entailed?—I have no doubt it must be of the utmost injury.

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Ruinous to the fee-simple value, and very prejudicial to the interest of the inheritance?—Very prejudicial and extremely liable to involve the proprietor in litigation, which is a very great aggravation of the other evils.

Do you happen to know any thing of judicial trusts in Scotland?—I know what the natures of them are.

Are you aware then, that the limit assigned by Lord Aberdeen's Act is, that, the heir in possession, if he finds the incumbrances too onerous may go into the court of Session and resign his estate to a judicial trust, and depart satisfied with retaining one-third of the clear rent?—I am aware of that.

If the operation of that statute should become general, and judicial trusts become general over estates in Scotland, is it your opinion that such management under judicial trusts, would be advantageous, or prejudicial, to the country at large?—Very prejudicial. I think, that from the consequences of the Montgomery Act and the Aberdeen Act combined, after the Aberdeen Act comes into extensive operation, the result may be, in the entailed estates in Scotland, that the revenues of the estates may become very limited; and that the revenues of such estates going to annuitants, the management of the estates may be vested in trustees, under the judicial directions of the court of Session; and that hence he, who is intended by his ancestor to be the proprietor of that estate, may be without any interest in the estate altogether.

Would not such a system of efflux of capital from the land to the cities, where the money lenders principally reside, naturally lead in your opinion, to the exhaustion of the soil itself?—I think it would be attended with great neglect of the soil; because, if the proprietor is not to look after his property and make it as productive as possible, it is not the interest of any one else to do so.

Of course it would lead to the dissolution of those bonds which unite the landed proprietor residing upon his estate, with his tenants and those immediately depending upon him?—I think so.

Would not such a state of affairs lead to disorganization of the whole frame of society in Scotland?—I think, very much so.

Among the other effects on a judicial trust, not only expensive, but generally speaking, are not the persons appointed, lawyers or accountants resident in Edinburgh?—They are very expensive; and the persons appointed are usually men of business in Edinburgh, usually accountants; and those accountants generally have men of business to assist them, who are called the agents; therefore, when an estate is under trust in Scotland, there is first of all the accountant who has charge of the affairs, then there is the agent who is the agent upon the estate, then there is the factor who is the factor upon the estate, instead of the proprietor of the estate doing all those things for himself.

Independently of the expense of management, from your knowledge of the political power in Scotland being vested very much in those who have the management of the estate, would there not also be a transfer of the political power to the lawyers, the agents and the factors?—I rather think it would; because if those people had all the power over the estate, they would make the proprietor vote as they pleased in all political questions.

Are there not many estates in Scotland in that situation, at the present moment?—I think so; I know there are a good many in my own neighbourhood, and very large estates.

Do you think that would be an advantageous transfer of the political power from the proprietor of the estate to the factor, the agent and the lawyer?—There can be no doubt upon that question, as far as the proprietor is concerned; and as far as the community is concerned, I think it would be a very disadvantageous thing.

You think the dissolution of the tie between landlord and tenant, and the loss of the political power by the proprietor, which would become vested in the judicial trustee, they would be highly disadvantageous to the community of Scotland?—I have no doubt of it.

Taking the operation of the Act of 1770 into your view, with the probable effect of Lord Aberdeen's Act, the real effect of it yet remaining unknown, do you entertain any doubt that such a state of affairs is not only possible but probable?—I think it is, from the effect of Lord Aberdeen's Act combined with what the Improvement Act may effect.

You have stated that your heir, according to the transactions you have entered into upon your estate, will succeed to about two-fifths of the rental, free; is your own

own life-interest at present sacrificed to a greater extent than three-fifths of the estate?—Yes.

You do not therefore yourself enjoy at present income of your own disposal equal to two-fifths of your estate?—No.

Would the position of your heir be better than your own?—Yes, it would be better than my own.

Inasmuch as he would be relieved from the interest of what you have borrowed upon your own personal security?—Yes.

And of course upon your life interest in the estate?—Yes.

If Lord Aberdeen's Act had not been in operation, could you have burthened the estate to your heir to the extent of three-fifths?—No, I could not; I could have burthened the estate, if I had chosen, to the extent of a fourth of the annual produce.

Then all that additional burthen upon your heir you are enabled to inflict by Lord Aberdeen's Act?—Yes.

You state that you have nevertheless exercised the powers under that Act very mercifully?—Very mercifully; my heir is my son.

Supposing upon your death that your son should come into possession of two-fifths, clear of the estate, as you say there is no chance of his very soon having any increase, will not he, in all probability, exercise the power that remains to him under Lord Aberdeen's Act?—I think it is probable that when he marries he may be disposed to do it; but he is a very young man at present.

If he has a son, that son will therefore not, in all probability, enjoy more than one-third of the free-rents, which is the limit imposed by the Act?—I should think not.

What power will your son have of providing for his wife and family?—He will have a very limited power of providing for his wife and family, until he removes the burthens which I may leave upon him; he will have a very limited power, supposing his mother to be living at the time; he may have another provision to make for a widow.

But your grandson will have to remove not only the burthens you may impose, but the burthens your son may impose, and therefore he may exist for the whole of his life on only one-third of the clear rent?—Yes; I think that that is possible.

Then the only means by which he can provide for his wife and family, must be, by borrowing at annuity interest upon that third?—Yes.

That will be placing him in that situation of trust that has been before described, will it not?—That might be the effect; it would probably be the effect.

Entirely denuding him from any exercise of authority over the estate?—I think that might be the probable effect.

Supposing your eldest son had an opportunity of making a very good marriage to a lady possessing capital, and that her relations insisted, before they gave their consent, on some adequate settlement being made a charge upon the estate; could you and he, though both concurring in the wish to make this alliance, offer any settlement or any valid security on the estate?—No; we could have no power upon the estate, because there is another heir after him.

Does not such a state of things prevent heirs of Entail frequently from making very advantageous marriage connexions?—I know no instance of it, but I think that might be a very probable effect.

If you had availed yourself of the whole power of the Act of 1770 for making improvements, do you think that sum would have been sufficient for what your estate required?—It would have been rather too little, but I could have made the estate much more valuable if I could have availed myself of going to the whole extent.

But you think, to do justice to your estate, you would have required a larger sum than four years' free-rent of the estate?—Yes.

Is your Entail one of very old date?—I cannot tell exactly the year, but it is about 1755 I believe, or some time between 1750 and 1760.

You conceive that a great deal of the improvement upon entailed estates is to be attributed to the facilities afforded by high rents some years ago?—By the facility of raising money; high rents alone would not have done it; but at a certain time there was a great facility in raising money: for example, I had no difficulty in getting any money I wanted by my own note of hand at the bankers; and it was in that way I raised money to carry on improvements.

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Are you aware, that whatever facilities were afforded by high rents at that time to the proprietors of the entailed estates, would have given effect equally to any disposition to improvement upon unentailed estates?—Certainly the facilities would be much greater.

Do you conceive that the subsequent fall in rents has been a greater injury to entailed or to the unentailed estates?—The subsequent fall of rents, as far as improvement goes, has been more injurious to the entailed estates, because the entailed proprietors were unable to go on with improvements, which might have promised great advantage; but the fall of rents has been very injurious also to the unentailed proprietors: It would require some consideration to say which has suffered most, but I should rather think that the entailed proprietors have suffered most.

Then do you not think it a point absolutely clear, that the entailed estate suffers more from the fall of rent than the unentailed estate in general?—No, I do not think so, as far as the land is concerned; the proprietors of entailed estates have suffered more certainly.

You are of opinion then, that while the rise of rents affords equal advantages to the proprietors of entailed and of unentailed estates, the fall of rents affects the proprietors of entailed estates more heavily than it does the proprietors of unentailed estates?—I have no doubt of it.

Are you aware of the general feeling prevailing amongst the proprietors of entailed estates in Scotland?—Yes, I think I am.

What should you state it to be as to an alteration in the Entail law?—I should generally say, that the feeling was in favour of an alteration among all classes of people in Scotland with whom I have had any intercourse; there is one class I have had no intercourse with, and I cannot say what the sentiments of such a class may be.

Has there been any public demonstration of that feeling till last year?—No, there has not; the feeling has existed, but it was considered vain to move in the matter.

You are aware that the bankers afford cash accounts; do not you esteem that a great facility to the improvement of land?—Yes it is, it facilitates the improvement of land, but bankers only afford cash accounts upon good security being given. Entailed proprietors cannot find that security.

Is it not true that many of the entailed proprietors have cash accounts?—Not many of the entailed proprietors can give the necessary security, but others can.

Is not this one of the causes why an entailed proprietor suffers more from the fall of rents than an unentailed proprietor, inasmuch as the unentailed proprietor can offer to the banker giving him a cash credit heritable security; whereas the entailed proprietor can only offer a personal security?—He can offer nothing but personal security, very frequently not that; for when rents fall with the entailed proprietor, his credit falls both in the opinion of his friends and of men of business.

Is not that one of the evils attending those cash credits, that when money is obtained and rents are high, there is no difficulty in obtaining them; and when rents fall and money becomes scarce they are called up at the most inconvenient moment?—I should rather suppose they were not called up at an inconvenient time provided the security were good.

Is not a proprietor under strict Entail unable to offer any security?—He is, because even his friends are extremely backward in being security on a cash account for him.

But the unentailed proprietor, even though in difficulties, being able to give heritable security, his friends are more willing to come forward to his aid?—Much more.

Within your recollection, have you observed a great number of Entails created?—Yes, I have observed a great many.

Were there amongst them a considerable proportion of Entails upon very small properties?—I do not know many in our part of the country of very small properties; I know them upon estates of five or six hundred a year; and I have heard of a prodigious spirit for entailing lately.

Should you say, from your observation, that the practice of entailing very small properties is at all increasing?—Yes, I think it is increasing; I have heard instances of it of a very ridiculous nature.

To what do you ascribe the increase of this spirit of entailing, while at the same time

time you say that the general feeling in Scotland is hostile to it?—I ascribe it to two causes: the one is, from the kind of passion there is among mankind for becoming the founders of families; the other is, that parents dying and perhaps leaving their children young, are determined that their estates shall not be alienated, and that they may not be the subjects of depredation by designing people.

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Should not you conceive there is great difference between the feelings of an entailer binding his heirs, and those of a substitute heir in possession wishing to release himself?—I should suppose there was a considerable difference.

Do you think that the general doing away Entails would tend to break up the old gentry of the country?—No, I cannot say that it would.

Would not it lead to the alienation of property?—It would lead ultimately to the alienation of property, that is to say, to property being more the subject of commerce, but not I think immediately.

Then the commercial men would take the place of the landed men?—I think that might be the case.

Then the old gentry would disappear?—Perhaps they might.

Do you not think it probable that that effect might not ultimately be produced?—I think so.

Might not the present proprietors or their heirs make arrangements which might render that unnecessary?—Yes.

Do not you conceive that if the law of Entails in Scotland was in some degree modified by certain family arrangements, the prosperity of Scotland might be preserved, and the dignity of the aristocracy of Scotland might be upheld?—I think so, but my reason for thinking so is from considering the law of Entail in England; we see that it is preserved in England, and such being the case, I can see no reason why it should not be equally well preserved in Scotland; but that is a subject I have not exercised my judgment upon, and that I consider myself rather inadequate to give an opinion upon.

Do you conceive that the prosperity and the general welfare of Scotland as a country, would be affected in any way by an alteration in the law of Entails in Scotland?—I think that the state of Scotland would be very much altered by it, but I think very much for the better.

In what respects do you think it would be altered so much for the better?—That land would become more a subject of commerce, and then one effect would be that we would have a great influx perhaps of English capital into Scotland from two very material causes; the one is, that we hardly know what it is to have a poors rate in Scotland; the other is, that we are very lightly burthened to the church, that is to say, that we have no church dues; and hence I think it might be desirable for those who wish to invest their money in land, to purchase in Scotland instead of purchasing in England.

Do you then conceive if the law of Entails in Scotland was modified in some degree, that the value of fee property would be materially altered?—No; I do not think it would immediately. I think it would not, because I am decidedly of opinion, that the result of any alteration that might be made would not be that of bringing land into the market. I judge from my own case, if any alteration was made in the law of Entail, I would not think of disposing of a foot of my estate, and I believe there are many entailed proprietors in the same condition. I think that ultimately, in process of time, the commerce of land might become more extensive.

Although you would not sell any of your land you would increase your income?—I think so, because I would be able to borrow money for the improvement of my estate.

From your general knowledge of the feelings and sentiments of the landed proprietors in different parts of Scotland, do you believe that any thing like a general feeling exists in favour of an alteration of the law of Scotch Entails?—I think so.

Upon what do you think that feeling is founded?—The feeling is founded upon the power that entailed proprietors would have of improving their estates, and thereby improving the country as far as the community was concerned, and thereby improving the condition of the poor by giving a great deal of employment.

You do not think it is merely a selfish feeling to do away with any particular embarrassment for the time being?—It is not merely a selfish feeling, but I would not say that selfishness may not partake a little in the feeling.

Supposing the attraction to English capitalists became so strong to purchase land in Scotland, owing to the causes you have mentioned, and supposing also that they

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they exercised the full power of entailing land; in your opinion would such outlay of British capital in Scotland be advantageous, or disadvantageous?—It would be advantageous immediately; but if they were to have the power of again entailing land in Scotland, I think Scotland would just degenerate into what it was before the entails were modified.

If the result were that the English capitalist resided here, having his estate locked up under strict Entail in Scotland, would not the effect be to inflict on Scotland all the evils of absentee landlords?—Yes, I think so.

Have you heard of English capitalists pouring out their money to buy land and entail it in Scotland to any extent?—Not to any extent. I heard of a case lately, but it is not a thing that I have heard of to any extent.

Have not you heard of an English nobleman buying land in a southern county of Scotland, for the purpose of availing himself of the statute of 1685, and permanently entailing it?—Yes; I have heard of an instance of that.

Is that the only instance you have heard of?—I just know one instance.

Did you ever hear that a very rich English banker has laid out his money to a considerable extent in the south of Scotland, and entailed his estate?—I think I have heard something of that, though I did not recollect it at first.

Amongst the proprietors of your acquaintance, do you know many who are in possession of entailed estates in good condition, and in the enjoyment of a large proportion of their income, who are anxious for a change of the law of Entail?—I cannot say that I have any opportunity of knowing any instances of that kind in fact I know no entailed proprietor in our neighbourhood that is not in distress, that is to say, that has not a very limited income.

You said that your opinion was, that there was a general feeling among entailed proprietors in favour of a change in the law of Entail?—Yes; but I did not advert to entailed proprietors who were in easy circumstances.

Although the entailed proprietors with whom you are acquainted, are very generally in distressed circumstances; knowing their attachment to the soil, do you believe if the fetters of Entail were relaxed that a sale of their estates would be the means to which they would resort for relieving themselves, were it allowed?—I do not think it would, because I think that entailed proprietors are usually very much attached to their property; and the entailed proprietors, in case of any such alteration taking place, from being the most distressed, would become, perhaps, the most easy people in their circumstances, for this reason, that they have not been able to get credit, and what is a very oppressive debt upon an entailed estate would not be a debt to signify upon a fee-simple estate.

Have you known in your own experience, individuals possessing their estates in fee struggle with those difficulties to the last extremity, rather than part with their paternal inheritance?—I have known that again and again; and it is a very usual observation, that proprietors in such a condition usually keep their estates too long.

Is the last resource, that the proprietors of land in Scotland resort to, that of sale?—It is.

And however the fetters of Entail were relaxed, you think that would still be the predominant feeling of the owners of the soil?—I think so, particularly where estates have been long in families.

Supposing a power were given of disposing of one-third of the estate at a time, and two-thirds remained entailed, what effect do you think that would have upon the land?—I do not think it would cause sale, because I think that almost every estate in Scotland is burthened to so small an amount, that the liberty of disposing of one-third, or even less would relieve them; I judge from my own case.

Are the Committee to understand that any change of the law you contemplate proceeds upon the footing of the heir in possession having the power to contract debt upon his estate?—To a certain extent.

To a limited extent?—To a limited extent.

Can you assign any limit?—The limit proposed is one-third.

What is your own idea upon that subject?—I could not suggest any thing like a general principle.

Supposing the law of England to be extended to Scotland, and that unless where the deed allowed it, the heir in possession had not power to contract debt or to incur debt for improving the estate, or for making any provision for his family, without the consent of the next heir; do you consider that your situation as the holder of entailed property, would be improved by that change?—I should suppose that

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that if I had not power to contract debt without the consent of the next heir, it would be of very little benefit towards giving me relief, because I look upon it that in nine cases out of ten the next heir would not give me his consent; and if I could not burthen my estate without the consent of my heir, that it would be doing nothing for me at all, it would be giving me little relief.

Do you not think, that much of the jealousy existing among substitute heirs to entailed property in Scotland, is very much owing to the state of the law?—Yes, I think so. I think it even goes so far, that it very often subsists between father and son.

Supposing the state of the law were such as to allow an arrangement of the kind that has been referred to, if the eldest son wished to have a settlement in life, either as a bachelor in the first instance, or afterwards for the purpose of entering into marriage, and if the heir of Entail in possession had some debts that he wished to charge his estate with, do you think that the son would not be inclined to admit those debts as a charge upon the estate, on condition of the heir of Entail in possession agreeing to give him a larger annual allowance for the remainder of his life, and also agreeing that he shall charge the estate with a jointure for his wife, and with portions for his younger children; would not that be a bargain likely to be made, and upon the further condition, that the estate which was disentailed, should be re-entailed upon the children of the marriage?—Yes, I think that arrangements of that kind might take place; and that the eldest son, perhaps, would be ready enough, if he was a thoughtless young man, to enter into any such arrangements, and give his father relief thereby; but I think it might be very much to his disadvantage, and that it would be sometimes an arrangement which they would have considerable difficulty in bringing about.

Would it be to his advantage to be enabled immediately to settle in life, and to settle a jointure upon his wife, and a portion upon his younger children, which he is not able to do now, during the life of his father?—I am not sure whether it would be an advantage or a disadvantage. I am rather doubtful whether it might not be the cause of a young man marrying before it was prudent to do so.

If it was possible to charge a jointure upon an estate, under such circumstances, in favour of a wife, would it not, in many cases, probably lead to the consequence of a heir of Entail marrying a lady with some money, which might also be brought in relief, to discharge a portion of his father's debts?—I think that quite possible.

Might it not, in other cases, lead to his marrying a lady without any money at all?—I think so.

Do you believe, that in most of the cases of entailed proprietors within your knowledge, who are in uneasy circumstances with respect to their property, that if they had the means given them of raising money with facility, by a relaxation of the law of Entail, they would find that power sufficient to extricate them from their difficulties?—Yes, I think so. I always judge from my own case, and I should suppose there are many parallel cases to mine; and I think it would answer the purpose of giving great relief, and complete relief.

Do you believe, that where Entails have endured for two or three generations, there are many heirs in possession now who are free of heavy incumbrances?—I should think not, and particularly on such estates where they have nothing but rents. Upon estates where there are woods, or other sources of income, they may be better off; but, generally speaking, there are none free of incumbrances.

Without a relaxation of the fetters of Entail, or some extraordinary good fortune on the part of the heir in possession, must he not transmit those incumbrances from generation to generation?—He cannot very well transmit any incumbrances, excepting what are authorized by the two Acts of Parliament, the Montgomery Act and the Aberdeen Act; he may transmit those incumbrances, but I do not see how he can transmit any others, except the present incumbent may involve his heir in engagements for him, in his lifetime, which was my own case.

Are you aware of the extent of the incumbrances which he may transmit, taking the Act of 1770, and Lord Aberdeen's Act, together?—I am.

What is the extent of those incumbrances?—The extent is two-thirds of the income of the estate.

As by Lord Aberdeen's Act, one-third of the estate is reserved to the heir, under all circumstances, must not there come heavy contingencies against that one-third, in diminution of it, such as a defalcation of rents, litigation, charges for manses, schools, school-houses, roads, law expenses, charges of management, and all the uncertainties which attach to landed property?—Yes, I am aware of that; and I am aware that

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that may very often cut down the heir's income to something very small indeed, particularly upon sudden changes of times.

Consequently, although the statute does reserve one third, such third will by no means remain entire, for the maintenance and comfort of the individual?—I am so much of that opinion, that if I were an heir succeeding under such circumstances, in many cases I would hardly take the management of the estate, and the trouble of the estate, for all I might get for it.

You are aware that, in Scotland, the personal estate is answerable for the debts of the individual?—It is.

Then, when a heir of Entail in possession dies, who has considerable personal incumbrances, the next heir succeeds with all the personal estate gone?—He has no right to the personal estate; usually, he does not succeed as heir to moveables, by the Scotch law.

Do you know many instances of dilapidation committed upon entailed estates, for the purpose of present benefit to the proprietor?—I am aware that such practices are not unusual.

Should not you say, that there were very great temptations existing under the law of Entail in Scotland, to an heir in possession to commit such dilapidations?—There are very great temptations, from their necessities, very often, and from the opportunity they have of acting in that way.

Is not it the interest of every heir in possession of an entailed estate in Scotland, unless he has a very strong interest in his immediate successor, to extract as much as possible, within his lifetime, from the estate?—Yes, it is; and it is frequently done.

Have you known many cases of valuable woods cut down to the injury of the estate?—Yes, I have known some cases; I have known a very striking one.

Have you known many cases of that sort?—I cannot say that I know many, but I have known some.

Are you aware of many cases of entailed estates on which there are valuable woods, where the woods have not been cut down?—Yes; particularly where they have served as ornamental timber about a gentleman's place.

Have you known cases of money raised under the Act of 1770, for the purpose of improvement upon the estate, misapplied?—I have known no instance of that; however it is necessary to state, that I am not conversant with the operations of any other person besides myself.

Are you aware of cases of entailed estates being managed in a manner which would be considered discreditable to the proprietors of fee-simple estates?—Yes.

And you consider that the interest created under Entail in the individual in possession for the time being, is the cause of such difference of management?—Yes; I consider that the interest of the incumbent for the time being, is very often at variance with the interest of the heir of Entail.

And consequently the heir in possession, particularly if he is not well inclined towards his heir, may exercise undue powers which are not prohibited by law?—Yes, I have known it done.

Is not it true, that all landed proprietors on entailed estates have very heavy incumbrances?—I have no doubt of it.

Did you ever hear of any that were free from heavy incumbrances?—I have known some that were not only free, but had a good deal of money besides; but those instances are not frequent.

Would not an heir of an unentailed estate be guilty of dilapidations upon the estate, rather than sell the land?—No doubt of it.

Would he not do as an entailed heir would in that case?—He certainly would; but he would not have such necessity as the entailed heir would have to do so.

If he were encumbered he would naturally cut down his trees?—He would cut his timber before he sold the estate, except the cutting of the timber would injure the sale of the estate.

Do you imagine that if he had the power of raising money with facility, and improving his estate to the extent he might desire, he would have the same temptation to commit such injury upon his estate, as if it were under entail?—Certainly not.

Could it possibly be for the interest of a proprietor of an unentailed estate, who was so circumstanced as to make it probable that he might be obliged to sell his estate, to cut down upon his estate the timber before it had reached maturity, so that the cutting it down would deteriorate the value of his estate?—I think it is possible that

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he might do so; because a man, as he advances in a state of necessity, has recourse to improper measures and to measures without economy, to give himself relief.

On the other hand, a proprietor of an entailed estate so circumstanced, who had not the alternative of selling his estate, or any part of it, could derive nothing but benefit from cutting down any timber in whatever state it was, or however unfit for cutting?—He might injure himself by cutting the timber too soon, but the advantage would go all to himself of cutting the timber.

Could he commit any other dilapidation besides cutting down trees?—Yes, I think so.

What could he do?—He might be very negligent as to the terms of granting his leases; and there are many other circumstances that I could mention.

Could not he allow old grass land to be broken up, and any given number of scourging crops to be taken off it for a short period, to enhance the rent during that period?—I have no doubt of that.

Have any such cases come within your knowledge?—Many.

Of entailed proprietors allowing the land to be exhausted for short periods, in order to get higher rents?—Yes; and in short, not taking those precautions and measures which were expedient for the purpose of preserving the land in a good state, and to make it ultimately productive.

You have already said, that you have borrowed for the improvement of your own estate, on security, at a rate of interest averaging eleven per cent.; if you had had the power of borrowing money at the legal rate of interest at five per cent. would the temptation have been as great to cut timber upon your estate, as it is now when you are paying eleven per cent. for the money?—Certainly not.

Supposing an heir of Entail in possession was to charge his estate under the Act of 1770 with the expense of planting, and that he lived long enough to be able to cut it down again, would not the succeeding substitute succeed to the estate burthened with the expense of an improvement from which he could derive no advantage?—Yes, that might happen under the Montgomery Act; but I may be permitted to observe, that it cannot very frequently happen, because it does not often happen that the planter of timber lives long enough to cut it down.

Is it common for the heir in possession and the next substitute heir to join together in raising money upon the estate for their joint lives, upon condition of dividing the money so raised between them?—I never knew a transaction of the kind; but I think sometimes it may be eligible.

Do you know instances of a son becoming liable to his father's debts?—Yes; my own case is an instance of it, and I have known other instances.

You were understood to state, that your opinion of the law of Entail is, that its tendency is to excite jealousies betwen father and son?—Yes, I have known instances of that.

Have not rents been falling very much of late?—Yes, for the last thirteen or fourteen years.

Will you be good enough to state what you consider to be the present market price of land in your part of the country?—I should suppose about twenty-eight or in some instances twenty-nine years' purchase, or it may be as low as twenty-seven; I have not known any sales take place at a lower rate than that.

Have there been many sales of land in that county within the last year?—No, very few; I hardly recollect any.

Does that asise from the difficulty of finding purchasers at the rate you mention?—Yes, I think it does; it arises from the difficulty of finding purchasers.

Does that arise from the state of the money market?—It does not arise from the state of the money market; my own opinion is, that it rather arises from the very precarious state that agriculture is in from the state of the corn laws, which prevents those who would be desirous to invest money in land from doing so; indeed I know one very striking instance of it, of a person that would invest money very largely, but he told me he would not think of any thing of the kind, till he saw what might be done with regard to the corn laws, and I rather think that keeps of purchasers.

In fact, the difficulty of finding purchasers arises from the uncertainty of the present rents being maintained?—From the uncertainty of what the rents may be; a man does not know what he ought to ask for his estate; and another man does not know what he ought to give.

Will you have the goodness to state to the Committee, what remedy has occurred to you as the most fit for the evils you have stated to arise from the present state of the law of Entail in Scotland?—I may state at once, that I have read Mr. Selkirk's

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publication, and that something of that nature is the species of remedy that I think would answer the purpose of giving the present Incumbents on entailed estates relief to the benefit of the community at large and to the least injury to the heirs.

Will you state your own idea of what the remedy should be?—By allowing the present incumbents and certain heirs to disentail and to become possessors in fee-simple of a certain portion of the estate; but it is with submission I give this opinion, because I do not consider myself qualified to judge in such matters.

Supposing a plan of that sort to be carried into effect, is it your opinion that such plan would lead to the dismemberment of the estate, or merely to the placing of the estate under a different system, but that it would in general, with some exceptions, remain as an entire estate?—I think that ultimately, in process of time, it would stand very much on the footing of ordinary fee-simple estates.

Do you think, that if upon each heir coming into possession, he had the right of disentailing a certain portion of the estate, it would lead to each party disentailing the portion to which he was entitled, or would he use every exertion to keep the estate together?—I think he would use every exertion to keep the estate together.

Do you apply that to cases where the next heir is not the man's own son but a collateral?—Where the heir in possession is not likely to be succeeded by his own son or by a brother, I think in such a case he would be disposed to sell and to dismember the estate; but I think if he were to be succeeded by a son or any near relation he would be very much disposed to keep the estate together.

Is there not a very strong feeling of family pride among all the Scotch proprietors whose ancestors have been in possession for several ages of their estates?—I am glad to say that there is.

Would not they wish to transmit their estates as entire as their difficulties would admit to their successors, even although they were not their own progeny?—I can speak my own sentiments; and I know that it is my sentiment; and that I believe it to be very generally the sentiment of the proprietors in Scotland.

From your knowledge of Scotch proprietors generally, is it your impression that that feeling would be almost universal?—I have no doubt of it.

Do not you think that the estate would be more likely to be kept entire, if it were altogether disentailed at once, than if it were disentailed in portions?—I should rather think not; I think that the disentailing gradually would superinduce a plan of economy that would not be so likely to take place if a man was unfettered all at once and put in possession of so great a disposable property; but it is with submission I give that opinion.

In cases where estates are heavily encumbered under the Acts of 1770 and 1824 in consequence of the fall of rents; would not it tend greatly to the relief of families and to the improvement of estates, if portions of the estate were allowed to be sold in order to disencumber the remainder?—I am decidedly of that way of thinking.

What you would recommend therefore, would be so to disentail a portion of the estate, that it might either be retained in fee-simple or disposed of, according to the circumstances of the case?—Yes, but it is with deference that I give that opinion; I do not consider myself very adequate to give an opinion upon that, not having studied this subject much.

Your preceding answers have applied to estates already entailed; what is your opinion as to allowing Entails in future, and under what limitations?—My own opinion is, that Entails generally speaking ought not to be allowed. With respect to the higher classes of society, I would not like to take upon me to judge as to what ought to be done as far as they are concerned, because it is a point that rather involves a constitutional question, which I would not like to take upon me to give an opinion upon.

In any cases in which Entails might be allowed in future, have you formed any opinion as to the limitations under which they should be allowed?—No I have not.

During the period that agricultural produce was very high and money was very easily obtained, was not it the practice of landed proprietors in Scotland to purchase, when they had opportunities, land adjoining to their own properties without having the means of paying for it, and then raising the money to pay for it?—Instances of that I have no doubt took place, but I do not believe that it was generally done. An entailed proprietor might be tempted to buy land, which perhaps what they call laid into him, when it was not a prudent transaction; occurrences of that kind took place, but I do not believe that it was very general.

Erskine Douglas Sandford, Esquire, called in; and Examined.

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ARE you a member of the Scotch bar?—I am.

Have you had occasion to turn your attention in a particular manner to the law of Entail in Scotland?—I have directed my attention a good deal to it, and I published in the year 1822 a work upon the law of Entail.

Have you in the course of your practice at the bar, and in the consideration of the subject, formed an opinion as to the general tendency and effect of the law upon the community in general?—I certainly have; and both from what I have seen and what I have studied, I consider the present state of the law of Entails as extremely inexpedient, both as it regards private individuals and the public.

In considering the Entail law of Scotland, do you consider the Act of 1685 alone, or do you consider the subsequent Acts in 1770 and in 1824 in conjunction with that?—In considering the present system of Entail law, I take into consideration the original Act of 1685, and also the subsequent attempts which were made to modify it by the statutes of 1770 and of 1824.

Will you favour the Committee with such general views as you may entertain in support of the opinion you have expressed; first, with respect to the community and the public interest of the country?—I consider that with regard to private individuals, the law of Entail as it exists has occasioned a great degree of litigation. Many of the most important questions that come before the court, arise from the present state of the law of Entail, and the conflicting interests of the heir in possession and of the different substitutes. I conceive that litigation must be considered as an evil to the individuals. There are few Entails which have not in some way or other given rise to questions, as to the power of administration of the heir in possession and the rights of the substitutes. Many most difficult questions arise, as to the lines of substitution, and who are to succeed under them. From a great number of substitutes being engrossed in the different Entails, after a certain time difficulties arise as to those who are to succeed under those substitutions, and many very difficult questions of title also arise.

Has a very considerable portion of the time of the courts of Scotland been occupied in the consideration of those important questions?—I consider a great deal within the last fifteen years. As an illustration of this, I may refer to the Roxburgh cases, to the Queensberry cases, to the Sheuchan cause, to the Bargany cause; and there is a most important question now depending with regard to part of the Panmure estate; there is also a very important case now in court, with regard to the estate of Cromarty, in Ross-shire. Those cases have taken up a great deal of the time of the court, and the House of Lords also.

Do you consider that the present result of all the litigation that has taken place is, to establish a well understood system of law, so that yourself or any other practitioner of the Scotch bar can afford positive and distinct advice to persons desiring to comply with the law?—That must depend a great deal upon the question that arises. I should say, that the powers of administration of the heir in possession, in consequence of the opinion of the late lord chancellor, given in the Queensberry cases, are better defined now than they were. I am aware, that there was a great deal of doubt and difficulty expressed as to these decisions by the Scotch bar at the time they were pronounced; but I think that Scotch lawyers are beginning to consider that those decisions were right.

Previous to those decisions, was not the general impression in Scotland, that the law was very different from what it is now established to be?—Undoubtedly. I do not know that this can be placed in a stronger light than by an opinion which one of the Judges expressed with reference to the Queensberry cases;—That he did not believe that during his practice, any lawyer ever doubted the right of an heir in possession to take a grassum.

To what Judge do you allude?—To Lord Hermand; the same opinion was also given by Sir Ilay Campbell.

Consequently the law, as you now consider it to be fixed, has established a totally different system of conduct in the administration of entailed property, from that which was before believed to be admissible?—Certainly it has.

It has limited the powers of an heir in possession, has it not?—Very much.

And that point being fixed by the highest authority, namely, the House of Peers, you hold to be the established law?—Yes. I am inclined to consider, that the principles upon which the lord chancellor proceeded, were right.

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Do you mean right in law, or in expediency?—Right in law. Right in expediency I hold to be a different question.

Do not the decisions of the House of Lords fix the law more decidedly than the decision of the court of Session?—Most undoubtedly.

Then the state of the law is far more settled now than it has hitherto been?—As to the powers of the heir in possession it is; at the same time there have been some difficult questions raised with respect to the power of the heir in possession in cutting wood. There have been bills of interdict applied for lately as to the estate of Gartmore; the proprietor left the country involved, and bills of interdict have been applied for by the next heir, to prevent the wood being cut and sold by his creditors; the court have refused to grant the interdict, except in so far as ornamental timber is concerned; but they have passed the bill generally, in order to try the question.

Although some of those recent decisions may have cleared the law of Scotland on certain points, have they not also raised very material doubts with respect to others; for example, has it not been decided, that an owner in fee by an Entail on himself and his heirs, can place his estate beyond the reach of his creditors?—No; I do not consider that to be settled. I am aware of the Sheuchan case; but I do not consider that the decision in that case went so far as that. The House of Lords laid down the principle, that where an Entail is for onerous consideration the estate cannot afterwards be attached for debt when the Entail has been made real; but I conceive the other question to be quite open; and I should not conceive that any court would decide that a proprietor could by an Entail, except for onerous consideration, put his estate beyond the reach of his personal debts.

Is not it still doubtful, whether gratuitous Entails are effectual against the personal debts of the entailer?—A doubt does arise; but I should not think it a doubt entitled to much respect.

Inasmuch as there is a decision in the court of Session, holding that a lease of thirty-one years is an alienation under the statute of 1685; and another decision, that a lease of twenty-one years is not an alienation; does not that leave a floating period betwen thirty-one years and twenty-one years, still neutral ground with respect to which it is undecided, whether a lease granted between those periods is an alienation, or not?—Undoubtedly it does; and that must be a question depending on the ordinary endurance of leases granted by the custom of the country; but there is one point of law which has been thrown into very great doubt by the decision in the Sheuchan case. It was there decided, that the Entail being made real by infeoffment was good against debts subsequently contracted. It has hitherto been held, at least since the case of Smollett in 1808, that the debts of an heir of Entail possessing upon an Entail not recorded, but upon which infeoffment has passed, are good against the entailed estate, We have now started that point afresh; it is now being argued in a very important case; and there is an impression, that as the Entail was made real by record prior to the debts being made real by adjudication, that the debts will not be held good against the estate.

Is not there a double registration necessary, in the register of Sasines and in the register of Entails. Under the Act of 1685 infeftment must pass upon the Entail; but besides that, the Entail must be recorded in the register of Entails. Where the heir coming into possession under an Entail of the estate made real by infeftment, and by registration in the register of sasines, contracts debts, the Entail not being recorded in the register of Entails, but before any adjudication is led by the creditor, the Entail is recorded in the register of Entails, so that all the provisions of the Act of 1685 are complied with; yet the court in the case of Smollett, held, that as the debts were contracted before the Entails was recorded in both registers, those personal debts might still be good against the estate notwithstanding the Entail. Now the case of Sheuchan settled this principle, that the heirs of Entail were to be considered as creditors having a right to demand that their right shall be completed; and if their rights were completed before adjudication was led by a creditor, then the Entail was real against the creditors and the estate could not be attached. We now say that this doctrine applies equally to the case of registering an Entail, and that if this is to be considered as a question of competition between the heirs of Entail on the one hand, and the personal creditors on the other hand, the right of the one being made real before the right of the other, that must be considered as the ruling right; and therefore the Entail being completed before any adjudication is led, will cut out the creditors.

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Then there are points still doubtful, both as to what constitutes valid registration, and as to what constitutes alienation under the Act of 1685?—Certainly.

Are not those most important points?—They are very important points.

And even at this moment grave doubts remain respecting both of those points?—I do not think that the question of alienation is so difficult a one as the other. I consider the law of alienation to be very completely settled, except with regard to the duration of leases; but I should hold that the custom of the country would be sufficient to regulate that,; and if it were proved that by the custom of the country leases were granted for twenty-three or twenty-five years, I should think that would be sufficient.

Did the court assign the custom of the country as a limit to the discretion of the person granting the lease?—I think, if I am not mistaken, they did in some of those cases arising under the Queensberry Entail, where the leases were granted for twenty-seven and for thirty-one years, I think it was assigned as a reason for supporting a lease of a certain endurance, that the lease was granted according to the custom of the country; but I am not aware whether that was sustained in the House of Lords or not.

You have no doubt turned your attention to the provisions of 10 Geo. 3, chap. 51?—I have.

Do you consider from your experience, that that statute has in practice been found to suit the purposes for which it was intended?—No, I do not think it has; because there is the utmost difficulty in applying its provisions, and a great deal of litigation has arisen in consequence of its provisions.

Do you apprehend, that in cases where it has been believed to have been complied with, frequent cases have arisen in which disappointment has been experienced by being decided, if such compliance is not effectual?—Certainly; for instance, take a case where intimation is made to an individual supposed to be the nearest heir of Entail, and it is afterwards found, that a nearer heir of Entail exists; everything has been done which was supposed necessary, but still the exact provisions of the Act have not been complied with; and I know one case in which a claim for improvements was set aside in consequence of that.

Do not you conceive that cases have arisen where securities, believed to have been created, have been found unavailable in consequence of there being a few days difference in the time of giving the notice or of filing the vouchers?—I am not aware of any case where a difficulty has arisen in consequence of the term of notice not being sufficient; but I can conceive such a case.

Are you aware of a certain case in which seven days having elapsed beyond the four months after Martinmas in filing the vouchers, the whole security was vitiated?—No; I cannot say that I am.

Is it your impression, that parties have abstained from resorting to that Act extensively, from the feeling of its being in truth difficult to comply with, so as to render its provisions effectual?—Certainly.

Are the forms complicated?—They are rather minute than complicated.

With reasonable attention, do not you think it is possible to avoid the failures that have been mentioned in the formalities of the notice?—Not in every instance; take the very case that did occur, of an individual being supposed to be the next heir substitute, and it afterwards being found that a nearer heir substitute existed.

Do you reckon that as one of the chief inconveniencies of this mode of giving notice, and of securing the money laid out in this way, that of not being able to find the next heir?—I think that is one inconvenience; but if I recollect right, in the provisisons of the statute there are very minute regulations as to the time at which intimation must be given; and there are some very minute regulations as to the manner in which the different bills or accounts contracted must be signed. I remember one case which took place, in which the improvements were not sustained, because every account was not signed by the heir in possession at the time.

Is not it a very rare occurrence that you cannot find out the next heir?—I am not sure that it is a very rare occurrence. If you consider the number of substitutions which occur in a Scotch Entail, and that a person may have come in under one; and there may be a second and a third or a fourth substitution which have failed in the mean time, he may not know who the next substitute is.

Is not the public opinion in Scotland such with regard to the liability of those securities to fail on investigation, that there is the utmost possible difficulty in borrowing

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rowing money under this statute?—I have heard men of business again and again declare, that they never would advise any client to lend money upon that security.

Is not there another difficulty in that statute, that in all cases even where the security is ultimately to be rendered effectual, the money must be first procured and expended, and the security constituted afterwards?—You cannot constitute the security till the money is expended.

Must there not be considerable difficulty in the heir of Entail procuring money without any security, even though this Act should be perfect in its power of affording such security?—Undoubtedly; because he must either have the money himself, or he must be able to borrow it upon his own personal security, or upon the security of land not entailed.

And more than that, must not one-fourth of the outlay be his own?—Yes.

Speaking generally as a person experienced in the law, should not you say, that the effect of this Act has fallen very far short of the purpose for which it was intended?—If I look at the preamble of that Act to see what it was intended for, and then observe how limited its application has been, I must come to the conclusion, that it has fallen very far short of the purpose for which it was intended. The preamble is to remedy the grievances that exist under the Scotch law of Entail.

Do you conceive that great part of those provisions, minute as they are, and difficult to be observed, are in fact necessary, in order to secure a due application of the money?—If I understand the law, it is this; that you must improve the estate in the first instance, and then by producing the account of what you have laid out, you are entitled to burthen the estate with a certain portion of it; and, therefore, all you do under it, is to get back a certain portion of what you have previously expended in actual improvement.

Is the power given by that Act, chiefly used to make provisions for younger children?—I am not aware of that.

You have, no doubt, turned your attention to the statute of 5 Geo. 4, c. 87, although that statute has been passed subsequently to the publication of your work upon this subject?—Yes; I have considered it generally.

What opinion have you formed as to the policy of that statute?—It seems to me to increase the evils of Entails and not to lighten them. I was of opinion before that statute passed, that it was one of the greatest grievances of an entailed proprietor not to be able to provide for his wife and children; undoubtedly that grievance has in a great degree been removed by that Act, but then the result is to place the heir in possession who succeeds after the provisions of that statute have been put in execution, in an excessively embarrassing situation.

Supposing the entailed proprietor to avail himself of the statutes of 10 Geo. 3, and 5 Geo. 4, what do you conceive must be the condition of those that come after him in the possession of the estate?—You give him a large landed property with a certain station in society to keep up, and the income he receives from his estate is manifestly unfit for that purpose. For instance, take a man with an estate of 6,000 *l.* a year; by the provisions of the last statute, he may be burthened to the extent of two-thirds; so that he is left with an income of 2,000 *l.*, out of which he has to pay the expenses of management, which in Scotch properties are generally very great, and he has the remainder to live upon.

On an average of cases on an estate of 6,000 *l.* a year, what do you think the proprietor would be reduced to for the purposes of his own expense?—I should think that calculating factor's fees and other expenses, and the chance of rents not being forthcoming, you could not reckon the annual expenses at less than four or five hundred a year, so that only 1,500 *l.* a year would remain to him; and if there is a series of judicial trusts as the Act gives the power of creating, I do not think he would receive so much.

Supposing two proprietors with families of the same description, and therefore of the same necessities, to make provisions for their children, the one being a proprietor of an entailed estate, the other of an unentailed estate; do you conceive that the proprietor of the entailed estate would be obliged to transmit the burthen of those provisions to his successor, in a more oppressive form than the proprietor of the unentailed estate?—I think where you lay the burthen of providing for the family of the former proprietor, entirely upon the income of the next successor, he never can be relieved from it, except by giving up his income; and I think it is better that the individual should have the power of relieving himself from the

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burthen by at once sacrificing a part of his capital than that his income should remain burthened to that amount.

Do you think that the unentailed proprietor, supposing he sold a part of his estate, would leave his estate in a condition more advantageous to his successors, than the entailed proprietor would do in burthening it under the Act of 5 Geo. 4?—That is a different question, because the third or fourth substitute may not in that case be burthened; he may come into possession of an entailed estate, which has been in the mean time relieved by the sacrifices which the previous proprietors were obliged to make; whereas if the proprietor is entitled to sell, the loss comes upon the whole series of heirs.

Then so far the law of Entail, with the addition of the Act of 5 Geo. 4, operates as a security in favour of successors?—It operates as a relief to subsequent heirs at the expense of the heir in possession.

With regard to the heir in possession and his immediate successors, in which case do you suppose the heir in possession would be able to burthen his estate with provisions for his family to the greatest advantage?—I think the individual succeeding is in a much better situation who is able to pay the amount of the provisions at once, than to have his income tied up.

Would not the great difference between the two cases, consist in the facility with which the proprietor of an unentailed property would probably be able to raise a sum of money for the purpose of paying those provisions?—Undoubtedly; because the other cannot do it at the time.

Is not the practical effect of Lord Aberdeen's Act to confer a benefit on the first heir, who takes advantage of it at the expense of all the heirs in succession?—Yes, I think so. Under the old Entail law, there might be no provision made for children, and of course the proprietor was obliged to insure his life, if he meant to leave any thing for his family, and therefore, there was a certain sum taken from his annual income. In the present instance he will not do that, because he can throw the burthen upon the next heir in succession.

Therefore that throws a permanent charge upon all the heirs in remainder, excepting the life-rent charges which may drop in?—Yes, till they are expired.

The portions to younger children are never likely to be paid off by the heir of Entail in possession, are they?—If I recollect rightly the provisions of the statute, they give so many years rent or the power of giving one-third of the rent to younger children.

Supposing that under the terms of Lord Aberdeen's Act, the heir in possession has gone into the court of Session and made an assignment of his estate, two-thirds being alloted to the charges made by his predecessor, and one-third being handed over to him, which arrangement would be made upon the existing rental, and that after the assignment rents fell; upon which portion would the defalcation of rent be cast, upon the two-thirds assigned, or upon the one-third reserved to the proprietor?—If there has been a regular assignment of the estate to a judicial trustee, I should think it would fall according to the respective interest of the individuals; for instance, that two-thirds of the defalcation must be taken from that which is conveyed to the judicial trustee, and one-third from the heir in possession. I do not think it could be made a total burthen either upon the provisions for children or upon the other third.

Is not the assignment of the two-thirds made absolute at the time, while the other third which is reserved is subject to various burthens, such as law suits, management, tithes, road rate, gaol rate; and therefore as all these are clearly cast upon the one-third, why should not the defalcation of rent be cast upon that also?—Because then you take more than two-thirds of the revenue of the heir in possession.

Is not that done by casting all those charges upon the one-third, and not distributing them over the two-thirds assigned?—That falls upon him *qua* proprietor of the estate.

Why may not, therefore, the defalcation of rent fall upon him *qua* proprietor of the estate?—I have not the Act before me, and it is difficult to give an opinion, without looking at the Act.

If part of the two-thirds in trust arose from interest upon bonds previously granted, which had passed into the hands of third parties for a valuable consideration, how could a judicial trustee evade paying the interest of those bonds, although a diminished rental came into his hands?—I am not prepared to answer that question, without seeing the Act. Upon looking at the statute, I observe that it

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fixes the period, when the yearly rent or value of the estate is to be estimated, at the time of the granter's death; and therefore the bonds of provision being for three years rent as at the granter's death, any defalcation of rent must fall upon the heir in possession, and on the other hand he would be benefited by any increase.

You stated that you considered the present law of Entail in Scotland produced a vast quantity of litigation, is it your opinion that it produces a greater quantity of litigation than the same value of property held in fee-simple, would do?—I should say certainly, to a considerable amount.

Is not entailed property liable to all the sources of litigation which unentailed property is, with all the difficulties of the entailed law superadded?—Undoubtedly, except in this respect, that difficult questions arise between creditors adjudging other estates; and there is no power of adjudication with respect to entailed estates, except the life interest of the heir in possession.

If the heir in possession, and the next substitute, had a power of borrowing money upon heritable security, could not they effect the improvement of their estates at half the cost, to the general benefit of the public and the real advantage of the fee-simple of the estate?—I am not aware, whether the merely giving a power to the heir in possession and the next heir, would lessen the expense of the improvement; but I should say, that more improvements would be made than there are now, and therefore, that would be to the advantage of the country.

Would it not reduce one-half of the interest now charged to an heir under strict Entail, borrowing money for that purpose?—I do not think an heir in possession borrowing money for the improvement of the estate, would get it upon better terms, because he intended to lay it out upon improvements, than if he borrowed for his private purposes.

Would not the next substitute, being naturally disposed to promote the improvement of his estate to which he stands next in succession, be induced to join the possessor in so borrowing, if they had the power conjointly of giving heritable security upon the estate for the money so borrowed?—Most certainly, if the power was given it would be very beneficial.

Would it not lead to a large outlay in the improvement of land, beneficially to the public, at a diminished cost to the possessors of entailed estates?—Yes; I have heard many entailed proprietors say, that they would wish to improve their property if they were able to get money for that purpose, but they could not afford to do it in the circumstances in which they were placed.

Have not you understood that Lord Eldon expressed an opinion, that the law of Entail in Scotland required an alteration, and suggested to Lord Corehouse the propriety of framing some measure for the modification of it?—I believe that you will find that opinion distinctly stated by the late lord chancellor in his speeches in the Queensberry cases, and I think in the Roxburgh cases; and I have heard from Lord Corehouse that he had conversations with the late lord chancellor regarding the propriety of bringing in a bill to that effect. Indeed Lord Chancellor Eldon goes so far in his speech in the Queensberry cases as to say, that he will be happy to lend his assistance to any gentleman that will bring forward a bill for that purpose.

During your experience, about what portion of the business of the court of Session should you say has been occupied by matters arrising out of the present system of Entails?—I should say, some of the longest and the most important cases we have, arise out of the law of Entail; but I cannot well divide the time of the court into portions.

Do you not consider that some of the heaviest work the lawyers of Scotland have had to do, has arisen out of the law of Entail?—Certainly.

Is it your opinion, that the state of the law of Entail calls for the interposition of the legislature?—Yes, I think it does, certainly.

Are you aware of what is the opinion of the bar of Scotland upon this point?—Yes, I may say that I know pretty well what is the opinion of the bar of Scotland.

Will you state generally, what you believe the opinion to be among the most intelligent and eminent practitioners at the Scotch bar?—The Committee are aware that the faculty of advocates many years ago considered this point with a good deal of care, and that then various resolutions were passed by the faculty, requiring a modification of the law, and I believe it was in consequence of these resolutions that the Montgomery Act was passed. There has lately been a good deal of attention directed to the subject, and I have heard the most able men at the bar express their opinions.

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opinions. I know that Lord Corehouse directed a great deal of his attention to it. Sir James Moncrief, Mr. Cockburn, and Mr. Jeffry, and many other leading men at our bar have done the same; and I believe that among those of my own standing there is a strong feeling that there ought to be a modification of the law.

What do you believe to be the feeling of the public of Scotland on this subject?—I should say, that the public of Scotland generally speaking thought a modification was necessary.

What is your means of ascertaining the sense of the public in Scotland?—I was called to attend, about three or four years ago, a meeting of the entailed proprietors of Scotland, and I was requested by the agents of some of them to assist in drawing up observations upon the Montgomery Act. This was before Lord Aberdeen's Act was passed; there was a very full attendance, and a very strong feeling expressed with regard to a general modification. A doubt was however entertained whether that could be at present obtained, and it was thought more advisable to apply for additional power to be given to heirs in possession, for the purpose of improvement, and for excambion, and for granting leases. I was requested to write out some observations upon the Montgomery Act, which I did, and they were submitted to the proprietors. In the mean time Lord Aberdeen's Act was passed, and they thought that would prevent Parliament from again taking up the subject. Within the last year and a half there have been several meetings of entailed proprietors, and resolutions passed by them which have been sent to me; therefore I should say, that from those circumstances, from seeing various letters in the newspapers upon the subject, from having heard it generally discussed in society, and from hearing the opinions expressed at those meetings of a number of individuals, that there was a strong feeling in the public upon the subject.

Were the meetings composed of considerable proprietors in different parts of the country?—I think most of the gentlemen that attended were agents; but I recollect that several men of consequence and property attended.

It is reasonable to presume, that those agents would attend your meetings at the desire and with the concurrence of their principals?—Yes.

Having stated your views thus far upon the subject, what would you suggest generally, as a remedy for the evils which appear to exist in the present system of Entail law; and possibly in giving this opinion you may find it convenient to take a distinction between the prospective and the retrospective application of such remedy?—I admit there may be room for different opinions upon that subject, but I am inclined to think, that there ought to be a power given to the present entailed proprietors (who in many cases are in great difficulties) to relieve themselves of those difficulties; I do not venture to say to what extent that power ought to be given, but I think a power should be given to that effect. With regard to the prospective measure, I believe it to be the opinion of some of the most intelligent of our lawyers, that there should be a majorat allowed for the nobility; and prospectively speaking, I think if the law of Entails in Scotland were placed on the same footing as the law of Entails in this country, it would be a great benefit to Scotland.

Does your opinion go along with that statement, that there should be a majorat created in favour of the great proprietors?—I do not say the great proprietors; I allude to the nobility.

What is the foundation of that opinion?—I have considered the question a good deal; and I think it necessary that the aristocracy of the country should be prevented from having the same power of alienating the whole of their estates, although that power may not, in a constitutional point of view, be of so much consequence in the other ranks of the community.

Do you know that the estates belonging to the great English families have remained in those families for a period of years, amounting to a greater number of years than perhaps the Scotch estates have remained in Scotch families?—I am aware that they have.

Do you think that a greater restriction is necessary in Scotland in order to retain the estates in the families of the nobility, than is necessary in England?—Perhaps I may be allowed to make this observation; that I happen to have heard it stated, that an opinion was entertained by a high authority, that if the majorat were allowed, a Bill for the modification of Entail law would be permitted.

Are you speaking still of a prospective measure?—I am; I have already mentioned Lord Corehouse's name. I have heard his Lordship express that opinion, and also Mr. Cockburn.

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Do you think that when they stated that opinion, they had distinctly before them the practical effect of the law of England, as having retained estates in the families of the nobility of the country for many centuries; or do you think that fact was not before them?—I think every man who is a great lawyer, as those individuals are, must be aware of that fact, and must be aware of what the law of England is.

Do you think they are aware of the fact, that the estates of the great families in England have remained much longer in those families, than the estates of the Scotch nobility have remained in their families, generally speaking?—I cannot say that that was immediately before them at the time of their expressing their opinion; but I am certain they must have thought of it.

When those gentlemen gave that opinion, with respect to the majorat, was it a concession made to expediency with a view of carrying the measure, or to a principle which they thought important?—I think more with a view to expediency.

Is it more with a view to expediency that you yourself have stated it?—Yes.

Not founded upon an abstract preference of the system?—Exactly.

Do you think that giving a power to sell an estate to the owner of it, would, generally speaking, be followed by the exercise of that power?—No, I do not; I should say if there were an old family estate, it would be the last thing any man would do to part with it.

Why then should a power to sell, granted to the nobility, lead to sales more frequently than you think would be the common result with other landed proprietors?—I do not mean to say it would lead to sale more frequently; but I think that the sale ought to be prevented. I can conceive circumstances arising, in which a nobleman might be obliged to part with his property. Then, in the next generation, there might be nothing to keep up the title; and a poor nobility is not desirable in any country.

If the effect of the law of Entail upon the estates of the nobility is such as you describe, under the present law, how are they to be kept in a state of wealth, by applying to them the majorat you propose; for it would appear, from your former answer, that the heir in possession may, in a very short time, become a very poor and incumbered person?—I would not allow the whole estate that a nobleman possessed to be entailed. I would allow the entail to be modified, and I should hope most of the nobility would have something beyond what they possessed, by the majorat.

Can you conceive a much lower degree of humiliation, than a judicial trust ruling the estate of a nobleman, with two-thirds directly assigned from him, and one-third only in his possession, liable to all the necessary incumbrances of the maintenance of the family estate, and keeping up his appearance as a nobleman?—No; but I have formed a very decided opinion, that Lord Aberdeen's Act is very inexpedient.

You are probably aware, that an English Entail may be got rid of under certain circumstances; for example, the tenant for life in possession, and the tenant in tail next in remainder, by suffering a recovery, may put an end to the Entail; then the general result of that practice is, that there is a new arrangement made, and the tenant for life, if he has incurred debt, generally receives some assistance from the estate; and a further consequence is, that the eldest son gets a larger annual allowance during his life, that he has also the power to make a jointure for his widow, and to settle portions on his younger children, and perhaps also to charge the estate with a sum of money, to repair the mansion-house, and to make every arrangement suitable to the circumstances of the family at the time; is it your opinion, that if the same law and the same practice were extended to Scotland, that that would be beneficial to the proprietors, and to the country at large?—Certainly. It is impossible for any one to look at the opinions of the great legal philosophers of England, from the first period when that power was given, without seeing that they considered it would be of prospective advantage that it should be granted; and from observing the consequences that have ensued, during the length of time the law has existed, and that no impoverishment has followed in the great families of England, I am naturally led to the conclusion, that it is highly beneficial.

Do not you think, that in cases of marriage it would be beneficial, inasmuch as ladies of fortune might be brought into the family, either to relieve a portion of the debts of the tenant for life, or to pay off part of the permanent charges upon the estate?—Yes.

Therefore

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Therefore that would all come to the aid of the estate, and the respectability of the family hereafter?—Certainly.

Having given your opinion with regard to a prospective measure, will you now state your opinion as to the best measure, if any measure should be adopted, with regard to the Entails now in existence?—I have already said, that I think a power ought to be given to heirs of Entail in possession, to relieve themselves from the difficulties they are in, and to pay off the charges to a certain amount; or else you are giving a benefit to subsequent heirs, of which you deprive the heirs in possession, who have most severely suffered from the present law.

Supposing you were to give similar powers in a retrospective measure to those which have now been discussed with reference to a prospective measure, but not to take effect till after the death of all substitute heirs now in existence; do you think that a measure of that sort would either be disagreeable to the landed proprietors of Scotland or detrimental to the country?—It is difficult to say what would be agreeable to the landed proprietors of the country; because of course, there must be a great many different opinions. I do not see why such a power should be detrimental to the country at large; because, I do not see how granting a power of sale, except in the instance of the nobility, where you have a certain rank to maintain, can be detrimental to the country. I do not see that whether *A.* or *B.* possesses an estate, it is of any consequence to the interests of the country.

Do not you think, that it is desirable that a country situated as this is, should have its ancient aristocracy maintained?—I think that has been done in England, and that it would be done in Scotland. Although you have the same power given as in England, I do not see why a Scotchman is to be supposed to be less fond of keeping up his family, than an Englishman has been.

Do not you believe it frequently happens, that the possessors of land in Scotland, with the power of sale under oppressive difficulties, from their attachment to the soil, retain it much longer than prudence and legal advisers would recommend?—I do not belong to that branch of the profession where it is possible to make these observations.

You have given an opinion prospectively as to the power that should be given to heirs in possession with respect to sale; do you think that power should extend beyond sales for improvements that have been absolutely laid upon the property, to relieve them from difficulties that they may have incurred by their own extravagance?—I think the one is a matter of equity and justice. With regard to the other, you must lay down some general rule as to the extent to which sales are to be allowed, and that may have the effect not only of relieving a man from burthens occasioned by improvements, but also from those he has incurred by extravagance.

Do you see any violation of any great principle of equity in a retrospective measure as applied to existing Entails, which, while it should religiously guard the rights of all the substitutes now in being, should destroy the vested rights of those yet unborn?—I do not think there is any vested right in those unborn. We scarcely consider that there is any vested right in a person not yet in existence. We consider that an individual in existence, has a vested right; but I do not think, if you take away that which has never vested, that you violate any rule or principle of law; you do not take from them what they never had.

Then a retrospective action trenching only upon such interests of parties not yet in being, would be a question altogether of policy, apart from any considerations of equity?—I should so esteem it.

With regard to the majorat you have referred to, do you see any objection to the anomaly that would be created, by placing two estates of similar amount under different legal circumstances; the one being in the hands of a person having a title, and the other being in the hands of an individual not having a title?—I think that the distinction of rank ought also to have a certain property to maintain it. I am only proposing that which has been admitted in many other countries besides this.

Supposing one estate to be for the most part free, and the other estate to be for the most part entailed, would not the political influence arising out of the one property be diminished with reference to the other?—That might so far be remedied, as a superiority is not of much value, except with reference to political influence, by not allowing the Entail of superiority.

By the law as it now stands, a tenant under Entail is allowed to sell his superiority, only it must be to his vassals?—Yes.

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You have said something about the necessity of giving a retrospective action, so far as relates to relieving the heir in possession from the pecuniary incumbrances incurred on account of outlay on his property; has it occurred to you whether it would be a better course if such an alteration in the law were made to render it necessary for the heir in possession seeking such relief, to go into the court of Session, and raise an action of declarator summoning the substitutes and requiring judicial proof; or would it be sufficient to give a simple power to the heir in possession and the next heir in remainder, of exercising that power without judicial proof and in private?—If you are to give a retrospective benefit only to a person embarrassed by having laid out money upon the improvement of his estate, you must have some mode of judicially ascertaining the amount so laid out; and I do not see any way in which you can do that, except by an action of declarator. On the other hand, if you allow it to be matter of arrangement between the heir in possession and the next heir, that the heir in possession shall have a certain sum of money raised upon the estate, it may be done in that way; but I do not see how you are to arrive at the fact, that the money has been laid out upon improvements, except by some judicial mode of ascertaining the amount.

Supposing it were limited to the outlay that had *boná fide* taken place upon the estate, which course would it be preferable to proceed, by an action of declarator giving judicial authority to enforce it, or to leave it to be arranged between the heir in possession and the next substitute?—I think, where you can make matters of that kind the subject of arrangement between the parties themselves, it is better that it should be so done; but I think it would be difficult.

On the whole you would incline to the mode of raising an action of declarator?—I should.

Of course under any such arrangement some limit must be assigned to the sum total to be so charged?—Yes, if that is the nature of the retrospective measure.

If the heir in possession were permitted to disentail a portion of his estate, say one-third or one-fourth, do you think it would be equitable and right, that in consideration of the relief he so obtained, he should be thereupon called upon to clear off the incumbrances created under the 10th of Geo. 3, and the incumbrances created in favour of younger children under the 5th of Geo. 4; thereby leaving the entailed portion of the estate unincumbered for the heir who might succeed?—I should consider that equitable; but it might be difficult to arrange. If you limit the amount which the heir in possession is to sell, it might not be sufficient to relieve the estate.

Pro tanto would it not be equitable that it should be incumbent on the heir in possession to do so?—Yes; and I think that if Lord Aberdeen's Act had gone to the extent of allowing the heir in possession to sell a portion of the estate for the purpose of paying the provisions, it would have been very beneficial.

You mentioned some names of high authority as being in favour of some modification of the law; are you aware of the nature of the modification which they contemplated?—No.

Do you know whether it was confined to a prospective action, or whether it extended to a retrospective one?—I believe they consider a prospective measure more likely to be approved of than retrospective; but if both could be obtained, they would consider it more beneficial.

Is there any thing in the principle of the law of Scotland to prevent a limitation, such as is adopted in the English law, being adopted, supposing the Act of 1685 were to remain as it is with the modification?—Nothing; because if you have the principle of allowing an Entail in perpetuity, you have the principle of allowing one for a limited period.

Veneris, 28° *die Martii*, 1828.

THOMAS FRANCIS KENNEDY, ESQUIRE,

IN THE CHAIR.

William Vizard, Esquire, called in; and Examined.

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THE Committee presume that your practice as a solicitor in London, has made you conversant with the law of Entail in England?—I may venture to say, Yes.

Will you have the goodness to give to the Committee, a sketch of that law as to the powers of entailing possessed by a tenant in fee?—Without going into any minute divisions, I may remark, that estates in England (and by estates I mean not the land itself, but the interest which the individual has in the land) is divided into three great classes: Estates for Life, Estates Tail and Estates in Fee-simple. An estate for life explains itself, it means an estate either for one or more lives; and such an estate can only be limited to persons in being at the time of the limitation, and not to after-born persons. An estate tail, is an estate limited either to a person in being or to an after-born person and the heirs of his body, being lineal descendants. An estate in fee-simple, is an estate limited to any individual and to his heirs general, and over which therefore the proprietor has an unlimited control; he may sell it or devise it by his will, and if he does not, it descends to his next heir. Estates tail, are created generally either by will or by marriage settlement. If by will, as it frequently happens that there are two persons in being who are intended to be benefited, namely, a grandfather making his will having a son and a grandson living, he then usually limits the estate to his son for life, to the grandson for life, with a limitation over to the issue to be born of the grandson in tail. When a marriage settlement is made, as the issue of that marriage of course is not yet born, then the limitation is this, (I am presuming a settlement made by the father of the intended husband) the father preserves of course his own life interest, he then limits the estate to his son who is about to be married, for his life, with remainder to the first and other sons in tail, and in default of male issue then to the daughters; and there is usually an ultimate limitation to the right heirs of the settlor, by means of which, if there should be no issue of the marriage the estate becomes again unfettered; and the eldest son the supposed husband, being the heir at law of his father, acquires again an absolute interest in the estate.

Then are the Committee to understand the result of this power, as stated by you, is, that the owner in fee can only entail his property for any number of lives in existence, and twenty-one years thereafter?—He has a power to entail it further than that; because the Entail is not limited to any number of years, the Entail depends upon the after-born issue and their lives, or until such after-born issue becomes of age.

The first new existence, therefore, coming into possession and attaining majority, may by a process of law convert his tenantcy in tail into an estate in fee?—An estate having been settled on marriage in the way I have supposed, remains locked up until the first son of that marriage becomes of age; upon his coming of age, he alone, if his father shall have died in the mean time, and with the concurrence of his father if he shall be living, may by a process which we call a fine or recovery, bar the Entail, and acquire again an uncontrolled use of the property; and it frequently happens that upon the son coming of age, if his father be living, that the father and the son together, for the mutual convenience of the family, bar the Entail. I should, perhaps, remark first, that in settlements upon marriage, it is usual to secure a jointure for the wife and provision for the younger children. By the time the eldest son comes of age it may happen, that the estate has increased in value, that the number of younger children may have become larger than was at first contemplated, or that the father may have laid out large sums in the improvement of the estate, in either of which cases the father probably wants to be relieved; he finds it necessary instead of twenty thousand pounds for younger children, that he should have the power of charging his estate with thirty, or he may have encumbered himself with 10,000*l.* of debt, which may have been laid out for the beneficial and permanent improvement of the estate, or he may have found that the improved income of the estate entitles his wife to a larger jointure

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than had been originally provided. For all of which cases he usually provides by an appeal to the good feeling of his son, who concurring with him enables him to make those provisions. As an inducement to the son so to do (because the son up to this time is entirely subject to the father's control, having no income of his own) it is very common for the son to stipulate that then a certain income shall be secured to him independent of his father, during his life; and these two things become the subject of bargain between the father and the son.

You have stated the case hitherto, with reference to the relation of father and son as heir in possession and heir next in remainder; have you any reason to doubt that such an arrangement as you have just described, sometimes takes place between the heir in possession and the next heir in remainder, where the relation of father and son does not exist?—It would very seldom, I think, apply to that state of relationship. Supposing there may have been a limitation by which the estate tail may be vested in a collateral branch, there is not the same interest or the same feeling to enable the proprietor to give an additional provision either to the wife or to the younger children. In the one case, a son is making a provision for his mother, and his brothers and sisters; in the other, it would be a collateral branch making a provision for those in whom he has not the same interest.

Though there is not the same feeling, is not there the same interest, inasmuch as the heir in possession will always wish to have any debt he has cleared off; and the heir in remainder will be anxious to obtain a larger immediate income, and the power of making a settlement and granting portions?—That case may occur, but I do not think it very often occurs; I cannot at the present moment bring to my recollection an instance in which that has occurred.

Though the feelings are different, is not the interest precisely the same in both cases?—In the case now put, it would become a mere question of interest; I can suppose a collateral tenant in tail very much straitened for income, who may, for the sake of a present income, consent to let a permanent charge be put upon the estate.

Is the conclusion to which you arrive as to such arrangements between father and son, upon the son attaining majority, that they proceed upon feeling altogether, apart from all consideration of mutual interest?—Not apart from all consideration of mutual interest; I apprehend that the arrangement arises out of a mixed feeling, the feeling of dutiful affection from the son to the father, and a desire to promote his wishes, and partly a regard to his own interest; because it enables him to get an income independent of the father, he being at that time wholly dependent upon the father for support.

Have those mutual arrangements between father and son frequently taken place under your notice?—Yes; I should say that they are cases of almost daily occurrence

And generally speaking, upon the framing of marriage settlements where the parties are under Entail, you have found no difficulty in making an arrangement equitable towards both parties and satisfactory to both?—Generally speaking, certainly. The good feeling natural between the two parties, induces them to do that which leads to a sensible arrangement adapted to the situation of both.

Have you, taking a disinterested view of the arrangement, generally found that which has appeared to you equitable, adopted by the father and the son?—Certainly; I have no doubt there are cases in which the father, practising upon the inexperience of the son, may drive a hard bargain with him; and so the son, actuated by a feeling of the necessity of the father, may drive a hard bargain with the father; but I do not think those cases often occur.

Are they the exception and not the general rule, as far as your practice enables you to form an opinion?—Certainly; I have alluded to the case of a father and son acting together immediately upon the son coming of age; there is another case in which the Entail remains in its dormant state till the son is going to be married again, and then something like the same arrangement takes place. In the first case, namely, that where no new marriage is in contemplation, it is usual for the father and son upon barring an Entail, not immediately to create a new Entail, but so to arrange the settlement as that no further charge can be made upon the estate, and no new settlement be made of it but with the joint concurrence of the father and son, who then afterwards operate upon the estate as may be most convenient to both. If a new marriage is in contemplation, then a new settlement immediately takes place, the estate is again put into settlement probably with pretty much the same sort of arrangements that were made upon the father's marriage; and it is by

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these successive settlements that the estates of our principal families are preserved; always observing, however, that by this opportunity of opening the Entail for a period, means are afforded to make such arrangements as may be best adapted to the varied situation of the parties.

Then though the Estate be periodically opened by the different heirs, for letting in particular charges, and for affording facilities which under the Entail itself they could not avail themselves of, yet practically after those purposes are answered the estate is resettled?—Usually the estate is resettled; and so it is that the estates in all our great families have been preserved; but it may happen, that the son upon coming of age may wish to abandon his situation as a landed proprietor; he may become a banker, or a merchant, and wish to get into business, and then he may sell his landed property, and apply the capital in any other way he may think proper.

Have you ever seen great advantage to result from the exercise of this power, by a father and son concurring to make a settlement, which the Entail itself would not allow them to make, when an advantageous marriage is contemplated upon the part of the son with a lady possessing capital?—Certainly; because it often happens that the lady's capital is made use of to pay off charges that there are upon the estate, and the consideration of the lady's fortune being so applied is, that provision is made for her and the expected issue of the marriage, by charges upon the estate.

Have you known cases where the guardians or parents of a lady possessing capital, would have refused their consent to the marriage had the Entail been in force, and could not have been relaxed, which marriage has been rendered acceptable to such parents or guardians by the relaxation of the fetters of the Entail, and a settlement being made with the concurrence of the heir in possession and the son about to be married, though in contravention of the Entail itself?—I have no doubt, that if a lady of respectable family, but without fortune, were about to be married, it would be a great objection on the part of her father or her guardians, that she should marry any one who had not the means of making a settlement upon her by charges upon the family estate; and if she had a fortune, the parent or the guardian would either settle that fortune upon her or keep it from the husband, or they would require an equivalent settlement for it; and I think that might very often happen to be a very inconvenient arrangement; and that the money may be much better applied in relieving the family estate from burthens, and it could not be so applied except by giving the lady an equivalent by a charge upon the estate.

In the sketch you have given of the law, you only contemplate the case of a tenant in tail taking in tail during the life-time of his father; supposing he comes to the inheritance upon the death of his father, will you state to the Committee how he converts his tenancy in tail into an estate in fee?—I think I have adverted to that case: If the father be dead before the son comes of age, the son when he comes of age does that alone, which if his father be living he cannot do without the concurrence of the father.

Does the result of your experience lead you to the conclusion, that the law of Entail of England is a happy medium between an unlimited restrictive power over the estate, and an undue latitude of power leading to frequent sale?—I should say, that looking at the situation of the great properties of the country, it seems to me to have answered all useful purposes; that by means of the successive settlements the property is prevented from being dwindled away, and yet it is open at intervals sufficient to make any new arrangement that may become convenient to the parties.

Has your experience led you to have any practical knowledge of the law of Entail as it operates upon large estates in Scotland?—My experience upon that subject is very limited; I happen to have seen something of an Entail of a very considerable estate in Scotland, which was productive of great inconvenience, and must, I think, have produced the entire ruin of a very considerable Scotch family but for the intervention of the legislature.

Will you, without mentioning names, shortly sketch to the Committee, the state of difficulty in which that family were involved under the law of Entail in Scotland?—I do not feel that I should be guilty of any breach of professional duty by adverting to facts, which are notorious, inasmuch as they appear in the journals of the House of Lords, and in all the Scotch courts. A Scotch proprietor of a very large estate, by a will, or a deed as they call it in Scotland, which is tantamount to a will,

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will, being considerably in debt, directed part of his estate to be sold, and the produce applied in the payment of his debts, and he put the remainder into strict settlement upon a very long line of ancestors, so that it appeared afterwards that there were at least forty heirs of Entail actually in existence, who attended the House of Lords, and consented to the Bill. I remember a great room filled with them. A part of that person's estates was directed to be sold for the payment of the debts. The other part entailed came to the present proprietor, who was exceedingly desirous that the estates directed to be sold should not be separated from the others, but yet he had no means of paying his father's debts except by borrowing himself; he therefore borrowed monies, paid the debts, and became the purchaser of those estates, with a view to keep them attached as they had before been to the other estates. He also bought other properties as intermixed with and as very convenient for the occupation of the family estates, and he had made all these purchases when lands were selling at extravagant prices, and when rents were enormously high. The consequence was, when rents began to fall, he found himself in a state of the greatest embarrassment, from the large outlay which was necessary to meet the interest upon his debts, and the diminished income which he possessed arising from the abatement of rents. In this situation he was when his eldest son came of age, and I think I might in round numbers say, that the estate must have been worth seven or eight hundred thousand pounds, and the debts were about 300,000 *l.*; but yet it seemed clear to every one, that but for this Act of Parliament that was obtained, the estate itself must have been torn to pieces and ruined, and that little or nothing would ever have been left for any heir of Entail, notwithstanding which neither the person in possession nor the heirs of Entail could take any step, nor even with the concurrence of all of them, could any step be taken to relieve the estate from those debts. Such a situation of affairs could never have occurred in England, because the tenant for life in England who would answer to the situation of the heir of Entail in possession in Scotland, could never have subjected the estate to any debt; and if he had incurred debts of his own for which he was personally liable, although the estate was not liable, then as I have said before, when his eldest son came of age, with the help of that eldest son he would have found the means of paying those debts.

Did the heir in possession in that case, inherit under strict Entail?—A great part of the estate.

Are you aware of the precise circumstances which rendered it doubtful under the law of Scotland, whether the debts which he had incurred were good against the estate, or no?—I feel some delicacy in going into detail upon that subject; I doubt whether I am at liberty to do so. According to the law of Scotland, the debts became charged upon the estate. When I say according to the law of Scotland, I mean according to that law as expounded by the court of Session, although I am aware that a different opinion was entertained by other legal authorities; but though the debts were thus charged upon the estate, no sale of any part of the estate could be made to pay them; no mortgage could be executed upon the estate to raise money to pay them; but yet each individual creditor, of which there were three hundred and eighty-eight in number, had the power by some process in the Scotch court to get possession of distinct parts of this estate, and keep it to pay himself, so that by this subdivision of it, and by the accumulation of law expenses, which must necessarily have attended every man proceeding to take care of himself, the whole estate must have been swallowed up.

Was that a case of strict Entail?—Yes.

Were the debts contracted by the entailer?—No; all the debts of the entailer were discharged; they were the debts of the heir of Entail; I should remark, that the heir of Entail acquired the power to let in those debts, by the omission to register the Entail; but then it seemed to English lawyers a very strange situation of things, that though the entailer had directed by the same instrument, that the heir of Entail should make this register within either six months or a year after his death, and though he expressly directed that no debts should ever become charges upon the estate, yet the heir of Entail next coming into possession had the power, by omitting to do that which he was positively directed to do, (namely, to register the Entail) of subjecting it to all those charges and all this inconvenience; and this to the prejudice of his own children, who, being minors, of course never interfered to have this register made. As I may perhaps have stated circumstances enough to lead to a knowledge of who the parties were I am adverting to, I should wish it to be understood, that I do not mean to insinuate that the neglect to register

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proceeded from any bad feeling or intention; I believe it was done from inadvertence altogether.

Was then the predicament of this estate, this, that owing to some imperfection in the registration of the Entail, it was a doubtful point whether the debts were good against the estate, or not?—It was not an imperfection in the registration, it was an omission to register at all.

Are you aware of the precise fact of the registration?—It was not registered at all by the heir of Entail in possession; but the eldest son when he came of age and found the situation in which the family property was involved, to prevent further charges coming in had the register completed.

But such was the doubt as to the validity of the debts against the estate, and such the alarming circumstances which would have attended each of the creditors, three hundred and eighty-eight in number, taking separate proceedings against the estate, that the large number of substitutes you have mentioned, as the less of two evils consented to the Act of Parliament letting in the whole charge upon the property?—Certainly; upon the bill being sent down to Scotland where it is submitted in the first instance to the Lords of Session, they were inclined at first to report against the Bill; and it was, after considerable discussion, that they at last reported in favour of it.

Was not the passing of that Act of Parliament an expensive proceeding?—With reference to the magnitude of the property and the object to be attained, I should not think it was very great; it may have been five or six hundred pounds. I know there was a great difficulty in obtaining that Act of Parliament, and great doubts expressed by the court of Session.

Are you aware, that even after the favourable report of the court of Session, by a Standing Order of the House of Lords, the concurrence of the various substitutes in proportions adapted to their proximity to the inheritance, is indispensably necessary?—Certainly; the Bill could not have been passed at all without the consent of a certain number of the heirs of Entail; which number is regulated by some Standing Order of the House of Lords; and as I said before, I think that Standing Order required the attendance of, I speak within bounds when I say forty individuals; who attended personally before the House to give their consent; and without it, is was the conviction of every branch of the family and every one connected with the estate, that it must have been entirely ruined. I apprehend the only inducement for those heirs of Entail to consent to such a debt being charged upon the estate, was the conviction on their mind, that but for that nothing would have been left for them.

Will you contrast such a position with the position of an estate of equal magnitude labouring under equal encumbrance in England, and state the remedies that might have been applied?—If a father in England with an estate of that magnitude found himself burthened with so considerable a debt, the natural course he would have taken would have been to ask his eldest son upon coming of age, to bar the Entail and sell outlying parts of the estate to pay off part of the debt, or perhaps partly by selling outlying parts of the estate and partly by mortgage upon the remaining part, would have made an arrangement which upon such a property would not have produced any serious mischief to the family; because if I suppose the estate to be of the value of eight or nine hundred thousand pounds, and the debt to be 300,000*l.* if he had sold enough to have paid off the 300,000*l.* he would still have had 600,000*l.* left; or he might have sold off enough to pay 150,000*l.* and have left the rest as a permanent charge upon the estate.

And it would have been so obviously the interest of the next heir to come to such an arrangement, that you have no doubt the next heir would have so done?—The same state of things can hardly occur in England, because the tenant for life could not have had the power of subjecting the estate to such a charge, and therefore the concurrence of the son must have proceeded altogether from the good feeling between him and the father. It may have happened, that part of the debt upon the estate may have preceded the Entail, and then there would have been no difficulty in that case, because by transferring the mortgage they might have borrowed the money again, and left the charge subsisting upon the estate.

But to make the case completely parallel, it should be a doubtful point, whether the debt were good or no; now take the case in England of there being a number of independent law suits of 388 individuals, involving all the chances of the result of those law suits, would not the heir, well advised in England, have a summary process by which, conjointly with his father, he might settle that matter at a small

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comparative expense with great facility?—My difficulty is to suppose such a case ever to arise in England, because a tenant for life cannot subject the estate to debt.

Then it is your opinion, that the possibility of such a case arising is to be traced to the state of the law in Scotland?—Certainly.

In England it would be impossible that such a case could arise?—Certainly.

You say that there were about forty heirs of Entail, who were brought together to consent to the Bill; were they only a part of the whole list of heirs of Entail?—I think the list of the heirs of Entail comprised nearly one hundred and fifty.

Are you aware whether there was any great difficulty in discovering who were the existing heirs of Entail?—In this particular case I do not think there was any great difficulty; because it being a very distinguished family, connected with all the most distinguished families in the country, their relationship was very easily made out; but in a family less highly connected, I can fancy that great difficulty might have attended the finding them out.

Do you happen to know if a large number of consents were given before the judges of the court of Session in Scotland, in addition to the forty given in England?—I had forgotten that; but I think there were some consents required before the Judges in Scotland.

In order to obtain such an Act of Parliament, it is necessary to have the consent of a certain prescribed portion of the heirs of Entail?—I think they are divided into classes, and that you must have a certain number of each class; they are divided into classes according to the nearness or the remoteness of the degree of relationship.

Must it be a certain proportion of each class, or a certain number of each class?—A proportion of each class, I think.

Then in order to ascertain the proportion of the heirs from eash class, whose consent must be obtained, you must first ascertain the whole list?—Yes; and evidence was given to prove the accuracy of that list. Some one connected with the family proved, from their knowledge of the family, that the list given into the House was a correct list.

It was not found very difficult to prove that list?—I do not think in this case there was much difficulty about it; but the list was sent up to me from Scotland, and I do not think that there was much difficulty, from the circumstance I have before stated.

In settling the estate in tail in England, what is the usual provision in proportion to the extent of the rental, that is made for a wife and younger children?—I do not think that there is any usual provision; the provision for a wife very much depends upon the fortune she brings; if a lady brings a large fortune, she is considered to be entitled to a more ample provision.

Suppose a gentleman were to marry a lady without any considerable fortune, and that he had an estate of 6,000*l.* a year, would you be prepared from your practice to say, what would be the usual extent of settlement a gentleman under such circumstances would make, the marriage being otherwise agreeable to his family?—I should think 1,000*l.* a year a liberal jointure.

And how much as a provision for younger children?—Perhaps twenty or thirty thousand pounds for younger children.

Suppose the eldest son on coming of age were again to contract a marriage with a lady who had no very considerable fortune, but that the marriage was otherwise acceptable; what provision in that case would the father and the son be likely to concur in, for providing for that lady and the issue of that marriage?—The jointure to be secured to the second lady, would be a jointure varying in amount upon the death of the preceding widow, it would be a jointure that would be smaller while both the ladies were living, and increasing to the second when the first should die; that is, the estate being already charged with 1,000*l.* a year for the one lady, and 20,000*l.* for younger children, I should think perhaps 300*l.* a year would be as much as would be secured absolutely to the widow of the second marriage, until by the death of the first widow the estate should be relieved from that 1,000*l.* a year, and that then her jointure would increase upon that falling in.

Is not a tenant in tail succeeding to an estate under these circumstances, very often in a state of great difficulty?—He is in a state of great difficulty if he and his father happen to disagree. One of the advantages of the system is, that inasmuch as the son can make no settlement upon his marriage, without the concurrence of his father, the father has a great check upon an improvident marriage by the son; and the

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the father has a further check, not only that the son can make no settlement without him, but that he has no income without him.

And the converse is equally true with respect to an advantageous match?—If an advantageous match presents itself, the father enables him to make every necessary arrangement to accomplish such a marriage.

When the estate is involved in difficulty from such circumstances as have been stated, is it a common circumstance that those difficulties lead to a sale and alienation of the property from the family?—Very seldom.

When an heir of Entail makes an advantageous marriage, if there be a debt upon the estate at the time of the marriage, how is the lady's fortune usually applied for the relief of the entailed estate?—By a payment of the existing debt, and then she and her issue get a charge upon the estate as a compensation for her fortune having been so applied. In Scotland I apprehend that no such arrangement could be made.

In an ordinary case where the Entail does not make any special provision, what are the powers of the tenant for life over the estate; can he burthen it in any way?—In no way, except with burthens that shall terminate with his life, and except special powers be reserved to him in the power which creates the Entail.

He cannot contract debt of course upon it?—Certainly not.

Or burthen it with any provisions for his family?—Certainly not.

You were understood to state, that in the event of a son and a father agreeing to set aside the Entail, an agreement might be made between them, by which no new Entail should be made for a certain length of time, but still the estate preserved unaffected by any debts or obligations?—Certainly.

Will a mortgage granted by the parties in that case, avail the creditors in any way?—Having barred the Entail, the father and the son may execute a good mortgage, which becomes a permanent charge upon the estate.

Can neither do it separately?—Neither; that is, I am supposing that at the moment they barred the Entail, they then by a new deed made an arrangement, the object of which is to prevent that very thing occurring. The usual limitation is, that the estate shall remain subject to the life interest of the father, and to such other uses as the father and the son jointly by deed shall appoint; so that neither the father nor the son can make an appointment or make a charge upon the estate without the concurrence of both.

And in default of any appointment, what happens?—In default of any appointment it is generally limited to the right heirs of the entailer, but if they join in making a mortgage upon the estate, that ultimate limitation is shut out from the power of charging the estate, because no man would lend money under such an ultimate limitation, foreseeing that by an intermediate appointment the effect of it might always be destroyed.

Is the existence of such an arrangement known to the public by any means?—In certain counties in England all deeds are registered, and in those counties it would be known. In counties where there is no such register it would not be known to the public. Whether a register be beneficial or not, is a subject upon which the greatest authorities in England have differed. I remember a great lawyer saying, that the only inconvenience he had ever found, was that once in the course of his life he had heard of such a settlement as this being concealed.

Then in those counties in which there is no register, creditors might lend money to the father and the son, and afterwards be disappointed by means of such a latent deed?—I think that can hardly occur, for this reason, that no man in England, because there is no register, lends money without the possession of the title deeds, and the possession of the title deeds protects him against any such charge; he also gets the legal estate, and having got the legal estate and the possession of the title deeds he would shut out this which would be an equitable charge.

When a second debt is contracted, what security is given to the creditor?—For reason before stated, no man in England will lend upon a second mortgage, except that it is sometimes done by a member of the family, or a friend who feels confident that no improper use will be made of it; but then it is usual to indorse upon the first mortgage a memorandum of the second mortgage having been made, so that notice of it shall go down; but that is a case of very rare occurrence, because in general the first mortgagee will not permit a second mortgage to be indorsed.

In the case of an Entail being put an end to in the way you have described, of course after that arrangement the estate is unthened, in the first place with the

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extent of relief which is agreed to be afforded to the tenant for life, and secondly, it is burthened with any allowance that is to be made to the son?—Certainly.

Then is not the estate considerably hampered after those proceedings have taken place, in many cases?—Amongst prudent persons, those arrangements are so adapted to the value of the estate, and the charges are so limited with reference to the amount of it, that I do not think practically, any great inconvenience occurs; that is, I think, it must always be admitted that the father must have a certain income, and the son must have a certain income; and the charges are generally made with reference to that income, which is felt to be adapted to the situation in life of the parties, so that the estate does not become improperly burthened.

In general it is presumed, the burthen must be very considerable in favour of the heir of Entail, when he is a collateral, to induce him to agree to an arrangement by which the tenant for life is to be benefited in the first instance, and by which he is to receive not an estate in fee-simple, but an estate in tail?—Probably, one of the arrangements in such a case might be, that the tenant in tail would stipulate to have the estate in fee-simple secured to himself, and thereby with the assistance of the tenant for life, put an end to the Entail altogether.

Putting considerations of feeling out of the question, generally speaking, cannot an arrangement be made between the heir in possession and the next heir in remainder, conducive to the interest of both parties, relaxing the fetters of the Entail?—I have no doubt, that if inquiries were made of all the solicitors in London concerned for the principal landed proprietors, it would be found that generally speaking, an arrangement of this sort is made beneficial to every branch of the family. There may be exceptions, but generally speaking, the father is kind and provident, and the son comes to make those arrangements before he has been out into the world and imbibed feelings that would lead him to drive a hard bargain with his father.

In point of fact, the gentlemen in the legal profession in England, have no difficulty in advising their clients as to what is an equitable and proper arrangement, under all the circumstances of the family?—I hardly know of any adverse discussion having arisen upon such a question.

When families holding entailed property get into very embarrassed circumstances, what is the common result in those cases to the property?—I have in my mind, one great family in this country, where the person in possession has by his own improvidence sunk all his income.

Does he still retain the estate?—He is tenant for life; and I am afaid the greater part of the estate is in the hands of creditors, who are annuitants or have various charges upon it.

Might not he, in conjunction with the tenant succeeding, put an end to the Entail, and pay off those debts?—I think, in the case to which I am adverting, it is an Entail created by will and not by settlement, and that the present possessor is only tenant for life; his eldest son is only tenant for life, and nothing can be done till the grandson comes of age.

In such cases, it is presumed no gentleman of character in the profession would advise the tenant in tail to suffer a recovery, and charge his father's debts upon the estate, which have arisen entirely from his own improvidence;—No; if it were an excessive case, I think any respectable professional man would protest against such an arrangement, and refuse to have anything to do with it.

But in such circumstances the estate itself must suffer, in point of improvement, as much as any Scotch estate?—By the terms of the original settlement the tenant for life may be precluded from cutting down timber and committing waste.

Are not the evils which have been mentioned, evils arising out of the existence of Entail at all, and which are probably counterbalanced by the policy of the law of Entail?—The necessary consequence of the Entail is to lock the estate up for a limited time. If there be any inconvenience in it, it is probably counterbalanced by the convenience that results from it.

Suppose that the law of Scotland, as to Entails, were made to apply to property in England; what, in your opinion, would be the effect of it?—If property be locked up interminably, I know nothing in England that is at all like it except the Church property; for the Church property is always kept in the same hands. I hear it generally remarked, that if you ride through a country, you can pretty well tell which the Church property is; there is no timber to be found upon it, and no person in possession of it does anything more than that which is absolutely necessary to extract

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extract a given rent out of it; no man lays out money for any great permanent improvement upon it.

Does such property seem to you to afford the only known analogy which exists in England to land held under interminable Entail?—I do not know any other.

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Do you think it makes no difference that in one case the estate in all probability is to go to a man's own family, and in the other to a person with whom he is in no way connected?—I can certainly feel, that a father recollecting that the estate is to go to his son may lay out money in improvements upon it; so that would be counterbalanced to a certain extent by the situation of church property, because though the body of the church retain the property, it is usually let out upon leases, and the lessee has, therefore, a certain interest in it, sometimes for twenty-one years, renewable every seven years, and sometimes for lives renewable upon the death of lives, but he has a certain degree of permanent interest that makes it his interest to lay out money upon it, but it is never to the same extent as the tenant in fee.

Supposing the limitations of a Scotch Entail were to carry an estate away to a distant branch of the family, the heir of Entail having daughters who do not succeed, what would be the probable effect upon the land?—I should think the only thing that the tenant in possession would think of, would be to scrape as much out of the estate as he could to raise a fortune for his daughters, and to let the estate go down without regard to those who were to come after him.

You have stated, that as an artificial legal system with a view to the preservation of families and their dignity, the system of Entail works well in England?—Certainly. I know no frequent practical inconvenience that results from it. There are certain profligate fathers and profligate sons whom no law can protect.

Would it materially affect the sytem of law in England, if the debts of the tenant for life were to affect the estate?—By degrees it would destroy the system altogether, because if the debts could affect the estate at all, they might affect it to an amount that would sweep it all away.

If the debts of the tenant in tail were to affect the estate, would that materially alter the English law?—That would operate in the same way, it might swallow up the estate.

Would it be an Entail at all if those debts affected the estate?—No. It is a supposed case, that according to the law of England, never can exist.

James Hurtle Fisher, Esquire, called in; and Examined.

James H. Fisher, Esq.

THE Committee understand, that you have had considerable experience with respect to the law of real property, and the settlement of estates in England?—I have.

They understand that among other clients the Duke of Bedford and the Earl of Shrewsbury are clients of yours?—They are.

Will you have the goodness to give the Committee generally, your opinion as to the advantages or disadvantages of the law of England, respecting Entail of real property?—I think there are various advantages attaching to the law of Entail in England, which may be classed under this general head, that it allows a restriction against alienation to an extent which has generally been found sufficient to answer the purpose of preserving property in families, and at the same time the restriction is not carried so far as to prevent the property being adapted by the proprietors to circumstances as they from time to time arise, and as the situation of their family may require. Speaking from my own experience of several instances, I have known cases where a tenant for life in doing that justice to the estate which a parent, knowing that the estate is to be inherited by his son, generally feels himself bound to do, has incurred very considerable expenses, the consequence of which has been, that he being restricted as tenant for life from charging the property beyond his own life estate, has been obliged to borrow very considerable sums of money by way of annuity, which is the only mode by which a tenant for life can obtain money upon the security of the estate. That party also has had a numerous family, which from the magnitude of the estate and the consequent appearance he was obliged to keep up, and the suitable education he had given to the junior branches of his family, as well as to his eldest son, the tenant in tail, has occasioned him very considerable expenses, and tended to involve him in addition to the money he had expended in the improvement of the estates. These circumstances have in several instances within my own knowledge, prevailed to such an extent as to absorb in anticipation nearly the whole income of the tenant for life, the consequences

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of which must be obvious, unless at some period or other he had an opportunity of making some arrangement which would alter his situation. That period has within my own experience been when his eldest son, the tenant in tail, has attained twenty-one. An arrangement has then been made, by which a sum of money has been borrowed upon the security of the estate, the tenant in tail joining the tenant for life; and that money being borrowed at a moderate rate of interest, sometimes four sometimes five per cent, has redeemed a charge upon the life estate of the tenant for life, to an amount four times as much in point of annual interest. For instance, I have known sums paid off by borrowing at five per cent, which had been previously paid for at the rate even of fifteen per cent, by way of annuity. That may at first appear to be an arrangement beneficial to the tenant for life only, but it generally happens that an arrangement is at the same time made for securing some income to the tenant in tail, which he could never have been possessed of during his father's lifetime had he not joined in suffering the recovery and in the arrangement alluded to; because, in the first place, his father would have been incapable of making him that allowance in consequence of the consumption of his income by the previous expenditure; and in the next place, he would not have had the inducement to make such a distinction between him and any other parts of the family. There are many cases of Entail where the powers for the management of the estate are very deficient. In such cases opportunities are afforded, upon a recovery being suffered, of introducing in any subsequent arrangement all the necessary powers, such as powers of leasing and exchanging and various other powers, which are necessary to the due management of an estate of any extent.

Then in every point of view, you consider that the arrangements which may be fairly made by the law of England under settlements of Entail of real property, are such as generally will benefit all the immediate branches of the family of the tenant for life as well as himself?—Certainly.

And you consider the advantages in every point of view to counterbalance the disadvantages?—Certainly.

Are you aware of any particular disadvantage arising from the system of the law of English Entail?—None at all.

Do you consider it a system whereby the dignity of the aristocracy is properly preserved in this country?—I do.

And a system whereby the comfort of the junior branches of the great families in England is, in a great degree, attended to?—Certainly; and I can speak more particularly to that from the circumstance of being concerned for a party, whose name there is not the slightest objection to mention, because his estates are entailed under an Act of Parliament, that is, an Act passed in the 6th of Geo. 1, for confirming a settlement made by the Earl of Shrewsbury of estates formerly belonging to the Duke of Shrewsbury.

Will you have the goodness to state the substance of that Act of Parliament?—That Act of Parliament limits all the estates which previously to the 6th of Geo. 1, were the property of the Duke of Shrewsbury, upon various persons who are named in the Act in tail male, and afterwards settles the estates upon the Earldom of Shrewsbury; but in the Act there is a restriction against alienating the estates, except under certain circumstances, which circumstances are taking certain oaths by the parties in possession, when they arrive at a certain age, and in fact becoming Protestants at eighteen, and continuing so till twenty-one. Having taken those oaths, they are placed in the same situation as common tenants in tail, and would be able to bar the estate tail; but unless they take those oaths between the ages of eighteen and twenty-one years, there is a general restriction against alienating the estates at all. The consequences of that restriction in this case, have been found extremely inconvenient; the Act of Parliament not containing any powers of exchange, a very insufficient power of leasing, and no powers of raising portions for younger children.

Is not that Act of Parliament with respect to Lord Shrewsbury's estate, in opposition to the general scope of the law of Entail in England?—Entirely so; it is entirely contrary to the policy of the English law.

Has not some application been made by the parties interested in that estate, to Parliament for a repeal of that Act?—Applications have been made from time to time, particularly within the three last Sessions of Parliament, for an Act to get more extended powers for the due management of the estate, and in fact to obtain such powers as are usually inserted in settlements of large estates, and which are considered necessary for the due management of those estates. In consequence of

the deficiency of powers in this Act of Parliament, not only the Earl of Shrewsbury, but other parties, who either under a misconception of the titles of former earls, or thinking that they would not be disturbed, having made some advantageous arrangements in the way of exchange, have, from time to time, been put to a very considerable expense in applications to Parliament for Acts to confirm those exchanges. Application is at this moment making to Parliament for an Act to contain all the necessary powers. There are various difficulties attaching in consequence of the strict Entail limited by the Act of Geo. 1.; and those inconveniencies have prevented the Earl of Shrewsbury for the last two Sessions obtaining the Act, and indeed induced him to abandon the attempt, after incurring very considerable expense. The chief difficulty has arisen in consequence of the numerous consents required in cases of Entails, by the Standing Orders of the House of Lords, before such a Bill can be obtained. In the present case it is presumed, that if the Standing Order was to have that extent of signification given to it which some contend it ought to have, it is impossible to calculate who, in the present case, would be the parties necessary to give their consent to this Bill. I am tolerably familiar with the pedigree of the Earl of Shrewsbury, but I have never yet been able to point out who those parties are; and not being able to do so, I have been obliged to recommend Lord Shrewsbury to abandon several attempts to obtain an Act of Parliament.

In fact, does not every species of inconvenience result from that strict Entail which has been imposed by that Act of Geo. 1.?—I think so.

Have you found that any advantage has accrued either to the interests of the estates themselves, or to the interests of the different parties that took under the Entail?—No, I consider the reverse.

Do you consider that if the estates had been suffered to descend under the common English law of Entail, the estates themselves would have been advantaged, and the different parties taking under that settlement would have been advantaged?—I cannot say that the different parties taking under the settlement would have been advantaged, for this reason, under the Act of Parliament the tenants in possession, who are in fact tenants in tail, with a restriction of alienation, and therefore no more than tenants for life, are empowered under the power of leasing in that Act, to let in a manner which in old Entails used to be the form adopted, namely, at the ancient and accustomed rents, which ancient and accustomed rents were the rents in existence at the time of passing the Act of Geo. 1.; the consequence of which is, that if the present Earl of Shrewsbury chose to adopt that course (but which he does not) he might let the present estates at certainly one-eighth part of their annual value; the consequence of which would be, that he would deprive the earldom of Shrewsbury of all its support, though it would benefit himself and his own individual family.

What was the nature of the provisions contained in that Act of 6 Geo. 1. as to each heir in succession taking certain oaths?—There is a general restriction from alienation, then there is an exception in favour of parties when they come into possession of the estates, taking certain oaths when they attain the age of eighteen; and continuing from that age Protestants till they attain twenty-one; they must first take the oath, and they must continue Protestants from eighteen to twenty-one, and during the time they continue Protestants they may bar the Entail.

What power have the different heirs of Entail over the estate?—Having taken those oaths, if they continue Protestants till twenty-one, they are during the time they continue Protestants placed in the same situation as common tenants in tail, and they could of themselves bar the estate tail and become tenants in fee.

Were you concerned for the personal representatives of the late Lord Peterborough?—No, I am concerned against them.

You know something of the circumstances attending that case?—I do.

Had not the late Lord Peterborough some considerable real property in Scotland?—He had.

Did he not make some lease which was set aside?—He did.

By what court of judicature was that set aside?—By the court of Session in Scotland.

Was not it set aside upon the ground that he had not power to make that lease?—It was; when I say it was set aside by the court of Session in Scotland, I am not accurate, I was not concerned at that time in the proceedings, but I believe the court of Session affirmed the lease, but the House of Lords set it aside. Lady

James H. Fisher, Esq.

28 March 1828.

Mordaunt took the first steps, and then she died; and the Duke of Gordon, the next heir of Entail, continued them.

Has not there been an action commenced against the personal representtive as of the lessor?—There has; that action was brought to recover damages under the general clause of warrandice, which was contained in the lease.

Were not damages recovered to a large amount?—Damages to the amount of 76,500*l.* were recovered against the representatives of Lord Peterborough.

Does any observation occur to you with regard to the law of Entail of English property?—No; I consider that the most material part of it is comprised under the general observation, that it authorizes such a restriction against alienation as is generally found sufficient to preserve property in families, whilst at the same time it enables the possessors from time to time to adapt the property to the circumstances and situation of their family, as those circumstances arise.

And you do not see that, from the power they have of making such arrangements according to existing circumstances, any thing is likely to arise that can prejudice the existence and the proper dignity of families of consequence?—No; I should consider that it would, in most cases, add to the support of a family, by enabling those beneficial arrangements to be made, which could not otherwise be accomplished.

Would you consider that, if it were possible to adapt the law of Scotland with regard to Entail of real property, to the English law, it would be an advantage, or a disadvantage?—I can hardly answer that question, not knowing sufficient of the law of Scotland.

Supposing the Duke of Shrewsbury's Act were extended to all the landed property in England, would it, in your opinion, be beneficial?—Quite the contrary; because it is so deficient in powers.

Are you aware of any evils attending the English system of Entails?—I am not.

Does any mode occur to you of improving it?—No.

Then you consider it perfect?—There might be a better mode suggested for barring Entails.

That relates merely to the technical machinery for getting rid of the Entail?—Yes.

Does your experience as a solicitor lead you to the conclusion that this periodical relaxation of the fetters of Entails in England, leads to an alienation of the ancient hereditary estates?—I think such instances are very rare; I know of none within my own knowledge, except small portions of estates which are better got rid of, than not—detached parts, that create expense in the management of them.

Are the entailed estates in England equally well cultivated and improved as other property?—I think they are, all that I have any connection with.

Does that in a great measure arise from the periodical arrangements that persons under Entail are enabled to make?—Yes; I consider that the present system conduces very materially to a due management of the estates, and to keep alive the interests of the owners.

Have the Entails continued for a great length of time of estates in England?—Yes.

It being pre-supposed that it is necessary to uphold the landed aristocracy, can you conceive any more temperate medium between unlimited power over property, and undue latitude of sale, than the law of Entail of England affords?—None.

Does it not tend much to keep all the branches of the same family on good terms with each other?—I think so.

As far as your experience has gone, have you ever found any difficulty in advising your clients to make that arrangement which you thought was equitable between party and party?—Certainly not.

In point of practice, does it lie with professional men in general to advise as to the course to be taken on such occasions?—It does.

So that the country have the security, not only of the inclination of the parties themselves, but of the character of the profession itself, for the adoption of proper measures when a recovery is suffered?—Yes; and in addition to that they have the protection of the law, which would, under certain circumstances, relieve the tenant in tail from any improvident bargain.

In your practice, have you ever had to advise an arrangement between a tenant for life in possession and the next in remainder, who was a collateral and not a descendant of his body, with respect to the relaxation of the fetters of an Entail?—No.

Have

Have you ever heard of any difficulties occurring in arrangements between persons in that situation in England?—I have never met in my own experience with an instance of that sort; I do not think it is common.

Are such arrangements not common between persons in that situation?—I think the occurrence does not often arise that an arrangement is required between a tenant for life and a tenant in tail, that tenant in tail not being an immediate descendant of the tenant for life.

Why should it not arise?—It would arise only in case of a failure of issue of the body of the party.

Is it not the case, in point of fact, that prior estates would not be barred by the recovery where the tenant in remainder was a distant branch of the family, but that it would only bar the estate over, and therefore the subsequent birth of issue would defeat all those arrangements?—Yes.

Is not the law this, that where there is a tenant for life in possession, he and any tenant in tail may suffer a recovery of all the Entail over, but they cannot affect prior estates?—Yes.

Are you acquainted with the management of Church property in England?—No.

Can you say whether there is any difference in the management of that property owing to the restrictions under which it is held?—The Church property, I believe, is managed under Acts of Parliament which define the powers of the patrons and incumbents; but I certainly agree in what I heard fall from Mr. Vizard, that in passing through the country where you do see farms out of condition, it is a general enquiry, whether or not that is not Church property.

Do you know whether the Act of Parliament you have mentioned relating to the Shrewsbury property, is the only one of that description in this country?—No; I think a certain portion of the Duke of Norfolk's estate is held under a similar Act of Parliament, and the Duke of Marlborough's.

Does not the system of English Entail depend entirely upon the estate not being liable to be affected by the debts of either the tenant for life or the tenant in tail?—Charges cannot be brought upon the estate without their joint concurrence.

Their life interest in the estate of course may be affected, but not the land?—The life interest, but not the estate itself.

In creating an Entail in England, is the succession ever restricted to heirs male?—Frequently the general course as to settlements or marriage, is to the husband, then to his first and other sons successively in tail male, and on failure of issue male then to his daughters as tenants in common in tail general, and then to his own heirs, except in cases of large estates, where it is wished to preserve the estate in the family.

In the event of the tenant in tail having no sons, then it is usual for the entailed estate to go to the daughters?—To the daughters, generally, as tenants in common, except in the cases alluded to.

In that case the estate becomes a divided property?—It does.

Supposing the eldest son has daughters, and the second son has male issue, does the property go to the eldest son's daughters?—No, to the second son's male issue.

What is the usual course followed when an estate in tail becomes an estate in common among daughters; is it then sold, or what other arrangement is most usually made?—I am not aware of any particular general course of arrangement; I take it that depends upon the circumstances of the family, and the agreement they may come to among themselves.

In your experience have you ever met with an estate descending upon daughters as tenants in common?—I have not; I am speaking of estates of considerable extent. In trifling estates we are in the constant habit of meeting with instances in making purchases, where all the daughters join in a conveyance to a purchaser; I should think that the general course is, that they all agree, to sell the estate, or to a partition.

Supposing the tenant for life should be an extremely improvident person, and incumbers his life interest to the very utmost, what would be the course pursued in the event of the tenant in tail coming of age, so as to be in a situation to suffer a recovery; is it the practice that those incumbrances (which are not incumbrances arising from his having benefited the estate by improvements, but from his own extravagance) are charged upon the estate, or are they left upon the tenant for life?—If they were of an unreasonable extent, they would.

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Would any respectable practitioner recommend a young tenant in tail to enter into such an arrangement for the exclusive benefit of the father?—Certainly not.

Do you believe that such an arrangement is common in England, whether the advise come from a respectable quarter, or the reverse?—No, I do not; I think that the tenant in tail, if he chose at any future time, would, under many circumstances, be relieved against an improvident arrangement, in a court of equity. The law here is very jealous of the exercise of parental authority in such cases, and would control it to a certain degree.

If tainted by any suspicious circumstances?—Yes.

In your practice or in your knowledge of the operation of the law of England, have any such cases arisen in court?—Not within my practice within my knowledge of the law they have; there are many cases upon that subject.

In which relief has been granted?—In which relief has been granted.

If the tenant for life and a distant heir of Entail have suffered a recovery, and afterwards a more immediate heir of Entail is born, what is the remedy to recover the possession?—The case cannot arise; the tenant for life remains in possession, he does not part with the possession by joining in a recovery. No arrangement can be made between those two parties for the disposition of the property, inasmuch as the birth of an intervening tenant in tail might lead to vacating the previous recovery.

And the possibility of such birth is always presumed?—Yes.

Is it not the case, that a tenant for life and such a distant heir of Entail not only cannot make a title to sell, but cannot even make a good valid security upon the estate to borrow money?—It is upon the same principle.

Have not there been many cases within your experience, in which the power of getting rid of the Entail has been the means of saving the property?—The means of very considerably benefiting it, not of saving the property, because nothing done by a tenant for life could be the means of disinheriting the tenant in tail; therefore the property would remain, but during the life of the tenant for life it might be considerably injured.

Might it not be so dilapidated during the life, of the tenant for life that the tenant in tail on succeeding to his inheritance might be driven by the necessities of the estate to part with it?—It might be, but it is a rare occurrence.

Are there not many cases in which, if it had not been within the power of the tenant for life and the tenant in tail to suffer a recovery, the embarrassment of the estate would have been very much increased?—The tenant for life would not have the means of keeping up the estate.

On the contrary, would not it be his interest to exhaust it and get as much out of it as he could during his life?—Certainly.

Might not that system of exhaustion pursued during his life, so cripple the estate that when the tenant in tail came into possession, his only resource, in order to clear the estate of debt, would be to sell it?—To sell, or incumber it.

In the settlements of great families, is there not generally a clause reserving the tenant for life a power to jointure a future wife, and to provide for the children of a future marriage?—Yes.

In point of fact, is not the great object to consider all the circumstances that may arise during the period the Entail has to run, and to meet those circumstances by providing for them in some way or other?—It is.

Does not this case also frequently happen, that when the tenant for life has an estate in fee, as well as being tenant for life of the estate tail, and he has incumbered his fee-simple estate to the utmost, and has at the same time got into difficulties beyond that in improving his estate; that this is made a condition, that the estate in fee shall be put into the settlement as a part of the equivalent which the tenant in tail shall receive for his agreeing to charge the estate in settlement with the debts of the tenant for life?—Certainly.

So that, in point of fact, the entailed estates are increased, and not diminished, by the arrangement?—Yes, I have known such instances occur.

[Adjourned.

SECOND

REPORT

From the Select Committee on Scotch Entails.

Ordered, by The House of Commons, *to be Printed*, 9 *June* 1828.

THE SELECT COMMITTEE to whom the BILL to alter and amend the Law concerning Entails in that part of Great Britain called *Scotland*, was referred; and who were empowered to report the MINUTES of the EVIDENCE taken before them, together with their Observations and Opinion thereupon, if they shall so think fit, from time to time to the House;—HAVE further considered the matter referred to them, and have agreed upon the following REPORT:

YOUR Committee have taken additional Evidence, calculated to ascertain the tendency and effects of the law of Entail in Scotland, which will be found materially to strengthen and confirm the opinion they have already expressed of the many evil consequences with which it is attended. They have not deemed it necessary to multiply the number of witnesses brought before them, but have selected those, who, from their station, interests, experience and knowledge, seemed best qualified to represent the opinions of different classes, and to supply information on which the Committee could most safely rely, and in several instances, without a previous knowledge of their opinions.

They consider themselves justified in reporting the prevalence of an universal opinion, that the law of Entail in Scotland demands immediate alteration and amendment.

Your Committee have had the advantage of obtaining the opinions and views of two noble Lords, which in their detail will be found deserving of the fullest consideration; and they have also the great advantage of being enabled to report the views of the Dean of the Faculty of Advocates, from whom Your Committee have received most important and valuable assistance, and whose evidence they beg to recommend to the especial consideration of the House.

Your Committee have the satisfaction to report to the House a Bill, in the preparation of which they have used every endeavour to provide a safe and salutary remedy for the many evils which are proved to exist in the law of Entail in Scotland; impressed as they are at the same time with a due sense of the difficulty which must always attend, and the caution which ought to be observed in pressing, a change in so important a branch of the law.

The provisions of the Bill will be found to comprehend three general objects:

1st. A prospective change in the law of Entail to affect all lands to be entailed subsequently to the date of an Act to be passed, practically and with simplicity assimilating, as far as circumstances and a due regard to the principles of the law of Scotland admit, the future law, to that system which in England is found to be attended with the most beneficial effects.

2d. A change which shall operate upon existing Entails, so that the present Entail Law shall be merged in the new system, on the expiration of all interests existing in persons living at the date of the Statute to be enacted, providing thereby that the period at which such change will be effected, must be gradual and as various as the state of each series of substitute heirs of Entail called to the succession of each estate now held under Entail. By such an enactment the rights and interests of all substitute heirs in Being at the date of the statute remain inviolate, and the principles which the legislature desires to recognize universally as wise and expedient, will thereby operate, so far as respects Entails now existing, only upon generations yet unborn.

3d. A measure of relief to heirs of Entail in possession, by which, under certain restrictions a power is conferred to declare a portion of the estate, not exceeding one-fourth part, Fee-simple, and such as Your Committee trust may be generally acceptable to those who are in possession of, without prejudice to those who may succeed to, entailed estates.

Preliminary to this part of the measure, the Bill proposes to repeal the Acts of the 10th Geo. 3, c. 51, and 5 Geo. 4, c. 87.

In reporting the Bill to the House, Your Committee deem it unfit, and inconsistent with the usage of Select Committees to which Bills are referred, as distinguished from Select Committees of Enquiry, to enter into an elaborate and reasoned Statement of its provisions, or of the principles upon which they are founded, and which will be best understood by a perusal of the Bill itself; but they cannot refrain from adding, that some, who were at first disinclined to a retrospective measure, were, from a more careful examination of the operation of the existing laws, from the force of the evidence, and from a conviction of the many and great evils resulting from the present system, induced cordially to concur in recommending the Bill, as now framed, to the favourable consideration of the House.

In

In conclusion, Your Committee beg to say that they have judged they should best promote the final success of this most important measure which has been referred to their consideration, by abstaining from pressing for its adoption during the present Session of Parliament, thinking that the Country is entitled to have an ample opportunity to consider the Evidence taken and the Measure which has been prepared; but while they express this opinion, Your Committee deem it necessary to add, that they trust Parliament will lose no time in adopting, either the Measure which Your Committee strongly recommend, or some other equally effectual remedy for the admitted evils of the existing system.

Your Committee consider it essential to a just consideration of the vast interests involved in the subject of the law of Entail of Scotland, that its imperfections should be remedied with all prudent dispatch, as, while a branch of the Law so important remains in agitation and under discussion, Enquiry having been instituted, great inconvenience must result from the prevalence of any uncertainty respecting the intentions of the Legislature.

9 *June* 1828.

WITNESSES.

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MINUTES OF EVIDENCE.

Jovis, 1° *die Maii*, 1828.

THOMAS FRANCIS KENNEDY, ESQUIRE,

IN THE CHAIR.

The Earl of *Rosebery*, attending by permission of the House of Lords, was Examined.

Earl of *Rosebery*.

1 May 1828.

THE Committee are aware that your Lordship is the proprietor of extensive landed estates in Scotland?—I have considerable estates in Scotland, in the counties of Edinburgh and Linlithgow, which counties adjoin each other, and form two of the Lothians, and the whole of that property is under a strict Entail, with the exception of comparatively a very small portion of it purchased by myself. It may be proper for me to take the liberty of mentioning to the Committee, that I am also proprietor of an estate in the county of Norfolk, which descended to me partly under what is termed in England, Strict Settlement; that is, according to the principle of the English law of Entail, and part of it I succeeded to in fee-simple; I mention this circumstance for the purpose of stating that, in consequence, I perhaps have more practical knowledge of the principle of the law of Entail of England than many other gentlemen who have only estates in Scotland.

In the administration of your Scotch estates, have you had occasion to know and consider the law of Entail as affecting landed property in that country?—I do not know whether with reference to my own estates I have so done, because it happened that they were not charged with fortunes for younger children, nor with any other debts affecting them except jointure; but I have certainly turned my attention, particularly of late, to the consideration of the law of Entail in Scotland.

Have you had occasion to form, and to entertain any opinion as to the effect of the law of Entail, with reference to the interests of the community and of individuals?—I have; and I certainly think that the law of Entail in Scotland, as at present, under strict, irritant and resolutive clauses, has a very injurious effect upon a vast number of individuals who have only property of that kind, and must be, in a public point of view, for various reasons, injurious to the community at large.

Upon your Lordship's accession to your Scotch estates, did they require considerable outlay in order to do them justice according to the progress of improvement which was at that time proceeding in Scotland?—Almost the whole of them undoubtedly did; and more particularly with respect to farm buildings, and that description of improvement, which is perhaps the most costly of all, and which invariably falls exclusively upon the proprietor.

Did you, in those circumstances, find that the system of the Entail law of Scotland, presented difficulties to the execution of such improvements as you considered necessary and expedient for the permanent benefit of your estates?—If I had not both possessed other funds besides those arising out of my entailed estate, and if my aggregate property had not been fortunately for me so large as to permit me to appropriate part of its income to those objects, I must either have been unable to make the improvements to which I have alluded, or I must have been reduced to very great pecuniary difficulty. Perhaps in addition I ought to say, that in my own case, as in many others of a similar nature, a proprietor in Scotland is, in a manner compelled to a certain degree, to lay out considerable

Earl of *Rosebery.*

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sums in certain particular descriptions of improvements; and with a view of explaining myself to the Committee, I will only state what has occurred, in many instances, on my own property. Leases fall in with such wretched accommodation for tenants, that it is utterly impossible either to let those farms for an adequate rent, or to obtain such a tenantry as it is desirable to have, without a renewal of or addition to the buildings; and, besides, the progress of civilization and improvement in Scotland, have been so rapid of late years, that it is almost impossible to get any tenantry at all to take farms unless you will give them sufficient accommodations. When therefore upon an entailed estate, leases fall in with very inadequate accommodation for tenants, the proprietor must in some way or other raise money to erect the necessary farm buildings, to meet the wants of the tenantry who may replace the old, or even to accommodate the old should they choose to continue in their farms.

Then the result of your Lordship's experience is, that difficulties present themselves in making necessary improvements upon an entailed property, which would not have been applicable to the same property if it had not been entailed?—It is.

Should not your Lordship have been placed in a very painful situation, as a landed proprietor, if you had not possessed the means of being able to do justice to your property according to the spirit of the times, and the progress of improvement in Scotland, at the period when that outlay became necessary?—I should certainly have been placed in a very painful predicament; because, I must either not have undertaken those improvements, or if I had, it would have been with very considerable pecuniary pressure.

Do you not apprehend that many cases must exist, even of large estates, where proprietors must have been placed in that position; because many persons possess entailed properties without any other property whatever?—I should think in all cases, almost, where the proprietor has no other but an entailed estate, he would be placed in those difficult circumstances, unless it happens to be so very large an one, and the individual lives so much within his income, as to afford a considerable portion of that income to be so applied.

You are aware of a statute 10 Geo. 3. chap. 51?—I am.

May the Committee ask, whether your Lordship has availed yourself, during the possession of your property, of the provisions of that statute, with a view to provide the necessary means of improving your estate?—I never have. It was more than once brought under my consideration to do so, with the view even if I did not choose to raise money under it myself, that I might have the power in case family arrangements or any other purpose might render my doing so desirable, to exercise it afterwards; but I have hitherto abstained from this, on being informed of the extreme difficulty and embarrassment that might arise, if there was the least flaw in carrying through the technicalities and regulations which that statute imposes upon the individual; and consequently, that the power, when it was desired to be exercised, might be found perfectly ineffectual. On these grounds I have never even taken the power to raise money by this mode, in any one instance.

Are you aware that a difficulty must frequently present itself in proceeding to act upon that statute, from this cause, that in all cases the money wanted, must, in the first instance, be found; and that it only provides a security, which is at best a doubtful security for that money, after it has been actually procured and expended?—I have often understood, from others, that that has been an operative motive with them not to improve under the provisions of that statute; and I think myself, as a matter of opinion, that it is a very reasonable objection.

In point of fact, your Lordship has expended large sums of money in necessary and beneficial improvements upon your estates, which form no charge upon those estates?—Since the year 1814, when I succeeded to them, I have expended a large sum of money upon my entailed estates, without reference to those estates not entailed, and which is in no shape or other a charge upon them.

Do you consider, that by so doing, you have conferred a large additional permanent value upon that property with reference to posterity?—That is in some shape a difficult question to answer; because it really is a question in one light, of opinion only; and in another it certainly is a question of fact, to which I can give, I think, a distinct reply. If I had not expended a great part of that sum upon farm buildings, and in some instances upon draining, I certainly could not have obtained the rents that I got in consequence of so doing; but if it is intended to ask me, whether

I get,

I get, as an investment upon the sum I have so expended, interest equal even to the purchase of freehold property, my own opinion is, that I have not.

Earl of *Rosebery.*

1 May 1828.

Do you consider that such outlay as your Lordship made, was dictated by the best discretion you could exercise at the time, in order to do justice to those estates?—Certainly.

So that your failing to receive all the benefits which might have been anticipated, is not attributable to any indiscretion on the part of your Lordship, but to those causes which are notorious as affecting the revenue arising from landed property?—Certainly.

While the power of making a charge upon your estate for such outlays, as in your discretion you thought fit to make, may not be a matter of importance to your Lordship, from the extent of your estates; do you not apprehend that many cases must exist where it would be most just to make those estates liable for the outlay, by which their value has been greatly enhanced?—I think decidedly so; even when the value has not been greatly enhanced; if the money laid out has been done with that kind of proper discretion, which shews that it was *bonâ fide* invested in improvements, for the purpose of ameliorating the condition of the estate.

You are also aware of a recent statute of the 5th Geo. 4. c. 87?—I conclude, that the allusion is to what is called Lord Aberdeen's Act; the general provisions of which I am well acquainted with.

Have you had occasion so far to consider it, as to form any opinion as to the expediency of the principle upon which that Act is framed?—I have; and I think that the motive which led to its enactment, was a good one; but that probably no one foresaw distinctly at the time when it passed, the consequences that must ensue, if it comes into general operation, which in my opinion, instead of doing what I apprehend to have been intended, namely, enabling proprietors of entailed estates with greater facility to raise portions for younger children, will only give the first holders of the property that power; and will not, if I am well informed, easily enable the younger children themselves to raise the capital which under that Act, might be nominally bestowed upon them; because, I apprehend, that practically speaking, nearly the same difficulty will arise in raising money for younger children upon the security of the provisions of that Act, as is found to be the case under the provisions of what is commonly called the Improvement Act.

Should you not consider it probable, that if that Act were to continue in force, it would be generally acted upon by proprietors of entailed property, so long as the powers of it remained unexhausted?—I should think it would be very generally acted upon by proprietors of entailed property having families, who have no other means either out of general funds or by possessing unentailed estates, to charge them for the benefit of their younger children.

And if so acted upon generally, what in your Lordship's apprehension will be the effect of such proceedings upon the independence, comfort and respectability of the parties succeeding to the entailed property?—I think the necessary and inevitable consequence must be, that the proprietors of entailed estates (many of whom are now, I fear, in considerable difficulties, owing to the various burthens which affect their estates) will, if that Act comes into full operation, be still further reduced in their circumstances.

Do you not therefore apprehend, that however good the intention of those with whom that statute originated, the effect must be to degrade and impoverish the landed gentry of Scotland, who hold their estates under Entail?—I think decidedly so; and in a way even more disagreeable to their feelings than if they had by their Entails the power of selling, and exercised it to meet any of those difficulties; because a man may nominally have six or eight thousand a year, who really possesses only two or three to spend; he is known in the country, generally speaking, as a man of the former income; but he feels that he cannot maintain himself but under the reduced one of two or three thousand a year.

You are aware of the provision contained in the statute of 5 Geo. 4, by which an heir coming into possession of an estate, cannot be deprived of above *two-thirds* of the rental?—I am aware of that circumstance.

Does it follow even under that safeguard, that the heir will possess an unencumbered income equal to one-third of the rental; must not the heir in possession for the time being be liable to such contingencies as the defalcation of rents, the defence of the property in any questions of law, and the occasional burthens to

Earl of *Rosebery.*

1 May 1828.

the permanent necessity of the estate, arising from churches, manses, school-houses and other contingencies to which landed property is liable in Scotland?—I think there can be no doubt that no individual proprietor of a landed estate, whether entailed or not, has anything equal in point of income to his apparent gross rental. From what I know of my own estate, which I believe is not subjected to more burthens of the description to which the question refers, than any other, I have always been perfectly satisfied to have the power of spending out of my rental four-fifths of it, assuming that one-fifth generally goes for what are called public burthens, as the taxes of various kinds affecting the estate, road and bridge money, and other local as well as fiscal taxes and other contingencies as annual outgoings, which usually average that amount. In short, upon an average of years, I conceive that a landed proprietor could hardly calculate upon receiving in the way of income for expenditure more than four-fifths of his rental. Then with reference to the question that has been put to me, there would be two-thirds deducted on account of the charges under Lord Aberdeen's Act; and there would be, by my estimate, one-fifth to be deducted from the remainder of the one-third, which would only leave one-third minus one-fifth to the proprietor to spend.

Taking, therefore, a general view of this state of landed property under Entail in Scotland, and of the state of the law, is it your Lordship's impression, that the time has now come when it is necessary and right that the legislature should interfere, not upon any petty principle, but upon an enlarged view of the whole subject, so as to give such relief as may be thought proper?—Does the question apply to estates now under Entail, or does it also embrace another question, with a view to the prevention of the existing law of Entail being carried on in future; because I consider that they are not only two separate questions, but that they require very distinct consideration.

Perhaps your Lordship would be so obliging as to direct your attention in the first place, to the view of the case applying to futurity; and in the second place, to the state of the law as affecting property now under Entail?—With respect to the former, I certainly think, from any observation I have made myself, and from communication with others in whose opinion I have considerable confidence, that the quantity of land now locked up in Scotland under the fetters of strict Entail, is so very large, that it has become highly desirable to interfere by legislative enactment to prevent the continuance of that system in future; more particularly as it has been stated, and I believe with truth, that in more than one instance, large capitalists from England are finding their way into Scotland, for the express purpose of investing their capital in estates in that country, for the sake of carrying into the families of those individuals landed property under perpetual Entail. This not only brings into that country larger sums of money than would otherwise be applied there, to be locked up in perpetual Entail; but also is attended with the very great additional evil, which perhaps may be even greater than the other, of introducing into Scotland a set of absentee proprietors, of whom hitherto it has happily had but few. Under both these views of the question, I feel decisively of opinion myself, that no time should be unnecessarily lost in providing for the future against perpetual Entails being made in Scotland. With regard to the other branch of the question, How far in my opinion, it is desirable to enact a remedial measure to remove the evils which are found to exist, in consequence of the perpetual Entails now in being, I have certainly turned my attention a good deal of late to that point, and I have formed my own opinion as to what I think it would be most judicious for the legislature, in the first instance, at least, to do with respect to it. For with regard to my own, and I rather think the same is the general feeling among the great body of entailed proprietors in Scotland, even among those who are embarrassed in consequence of those very Entails; I apprehend, it does not lead them, any more than myself, to be desirous of opening them altogether; but rather to wish to try the experiment of some alleviation being applied to them. If the Committee wish me to do so at present, I would take the liberty of stating the mode in which, according to my ideas, it might be right to apply a remedy to the Entails now existing. I think it seems to be settled, that some of the principal burthens which affect entailed proprietors in Scotland, arise out of money laid out upon improvements and now out of charges, made under the power given by Lord Aberdeen's Act, to raise fortunes for younger children. There is, I think, another class of entailed proprietors, who must suffer considerably from debts which affect their estates; I allude to those who have succeeded to estates upon which the entailers debts are charged;

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charged; and also to those who not having had their Entails recorded, are still liable to the debts which are placed upon those estates. I may be wrong in point of law, in one of those points; and I am aware that there is a considerable doubt among the legal profession, how far an individual can incur debts gratuitously upon an estate, he being the individual who entails the estate. I have heard that there is great doubt upon that head; but I believe, in point of fact, it has been done frequently; and I think I know individuals who have been called upon to pay those debts, or at least whose estates are charged with them, and who have been forced to bear the burthen of them, or to apply to Parliament for an Act to sell a portion of the estate for their liquidation. I have named, therefore, Four descriptions of burthens which at present affect entailed estates: namely, Those which under the Improvement Act may be placed upon the estate; Those under Lord Aberdeen's Act, for the purpose of raising fortunes for younger children; Those that may be charged upon estates where there are unrecorded Entails; And those which load the estate charged upon it by the entailer himself. My impression is, that it would not be a principle to which any reasonable objection can be made, that in every case where Parliament allows individuals approaching it, to get an Act for the sale of portions of entailed estates for particular purposes, you should give in such instances a general remedy; because the Committee will bear in mind, that an individual coming to Parliament for such an Act, is not only under the disadvantage of being at a certain expense, which if he is in very embarrassed circumstances, is of itself some consideration; but that Parliament, or at least the House of Lords, would not pass the Act, without a specified proportion of consents of heirs. Both the expense of such an Act, and the necessity for consents would, according to the plan which I am now suggesting, be rendered unnecessary. I would, therefore, in all cases of debts affecting an entailed estate created by the act of the entailer, and in addition to this class, in all cases where they are raised under the Improvement Act, in all cases where they are raised under Lord Aberdeen's Act, and in cases where they stand upon the estates in consequence of the Entails not being recorded, give a permissive power by legislative enactment with proper guards, to defray those debts by selling a portion of the estate. By proper guards, I mean by the intervention of the court of Session or in some such shape, to take care that no more than is necessary for the liquidation of those debts, should be sold at the instance of the heir of Entail holding the property at the time. Such a plan as that would, I think, have the double advantage of releasing from very great pecuniary difficulty many individuals, and be the means also of throwing into the market a very considerable portion of landed property; and thus create a transfer of land in that country very desirable, with a view to general improvement; though nothing would be more hostile to my principles or feelings, than by any plan to break down or lower the aristocracy of Scotland, under which term I include not only the nobility but the gentry of ancient families.

Supposing the system of entailing which exists, with reference to futurity to be stopped, as your Lordship has suggested, can you favour the Committee with any opinion as to what system might be substituted as a plan of Entail, upon a limited principle, for the future?—I feel no difficulty in answering that question, by saying that I think the Committee could not recommend to Parliament a better principle of Entail than the one which is established in England; taking care, however, to simplify its mode of operation, and not by any of the fictions, and their consequent expenses, and which are now attendant upon breaking an English Entail, to be guilty either of imposing upon individuals the hardship of that expense, or bringing before Parliament an Act with such provisions as appear to me quite unnecessary and absurd.

Supposing such a system to be provided with respect to the future settlement of landed property in Scotland, can your Lordship suggest any mode by which the property now held under the strict law of perpetual Entail, might in the progress of time gradually be merged in the new system, without injury to the rights of parties?—I am unable of myself to suggest anything upon that subject; I have read the various propositions which I have met with for doing this, of which one was a plan to disentail a certain proportion of the estate for that object. There is a second plan, I understand, by which it is proposed to allow the Entail to go on as at present till it comes into the hands of the last substitute; and when the Entailed estate happens to fall into his hands, I understand the plan to be to confer in that case a power to alienate. I do not at present see any objection to that latter plan.

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I have on various accounts and for various reasons, which I need not fatigue the Committee with stating, a most decided objection to the proposition of allowing successive heirs to disentail to the extent of one-third or any given proportion that may be named.

Can you favour the Committee with any additional observations of a general or particular nature upon this subject?—With regard to the general question of relieving entailed proprietors, and of facilitating what I think it is desirable for every proprietor to have it in his power to do, I would beg to call the attention of the Committee to the subject of the power of exchanging Entailed estates, and the power of what in Scotland is called Fueing, which is generally applicable to building leases. With regard to exchange, the Committee is as well aware as I am, that under a particular Act of Parliament a limited power for that purpose is given, but beyond that, individuals, however necessary the exchange may be, are obliged to come to Parliament to effect it; and I believe that in that case too it is absolutely necessary to obtain the consents of heirs. The Committee are also probably aware, that an Act was introduced into the House of Lords last session, which went through certain stages, to give power to an unlimited extent, both to exchange and to feu. It was intended to reintroduce that Act this session, which hitherto has not been done. I am of opinion, that that portion of the Act which will confer an unlimited power of exchange under proper guards, which are taken in that Act, to prevent improper and improvident exchanges, would be a very valuable relief to entailed proprietors. With regard to fueing, I think that much more liberty ought to be granted than is conferred under the provisions of the present law; but I am by no means prepared to allow or to recommend the unlimited power of fueing without any qualification whatever, which by that Act was proposed to be given; for I think the consequence of that would be not only extremely injurious in many cases, to the comfort and beauty of the proprietors residences, which residences it is to be recollected by this very Act, he is prohibited from alienating, although his predecessor may make it hardly tolerable to reside at. In a public point of view, I think an indefinite power of this kind might be very injurious, by raising up large numbers of small tenements, with a population of poor persons in times of great public prosperity or excitement, who, when a re-action takes place, become a burthen to the country. For both these reasons, though I approve of granting a power of fueing much beyond what is now allowed to entailed proprietors, I think it should be guarded by some limit or qualification, to prevent the evils to which I have now referred. There is one other point which at present strikes my mind, as a hardship upon a particular class of entailed proprietors. I allude to the fact, that if a person is proprietor of an entailed estate, however large, if he be a Peer, he has no vote himself, and he can give none to any of his sons or any other person. A man may have the largest estate in that part of the kingdom, and if it be under the fetters of strict Entail, and if he is a Peer of the realm, I do not see that his estate gives him any political importance in respect of voting. The personal importance arising out of large territory undoubtedly belongs to him, but the weight of that estate in the country with respect to even a single vote upon it, he does not possess.

Your Lordship has stated, that you are the proprietor of a very considerable estate in England as well as in Scotland?—I have a considerable estate in Norfolk.

Your Lordship is therefore aware of the mode in which the English law of Entail affects the property in England?—Perfectly.

Is it your Lordship's opinion, that the law as it affects real property in England, is advantageous or otherwise to the maintenance of the respectability of the aristocracy in England —I think it advantageous to that object; and I believe the law of Entail in England, as practically exercised, supports ancient families; and in some points of view, perhaps supports them better than the law of Entail, though more strict, in Scotland.

Therefore it is your opinion, that if the law of England, in as far as is compatible with the law of Scotland, could be extended to that part of the empire, more especially as a prospective measure, the same good effects would be extended to that part of the empire as have been hitherto enjoyed in this?—I entirely agree in that opinion prospectively.

And if the means could be fallen upon of doing it without interfering with existing rights, that it might also probably have the same effect in a retrospective point of view?—I am not prepared to say that I would make the change retrospectively

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tively for that object, because I think various considerations press themselves upon my mind against doing so, at least till other experiments are tried for the purpose of alleviating the evils which are found to exist in consequence of the Scotch law of Entail. If the whole of Scotland had been originally placed under a system of Entail law similar to that of England, I should undoubtedly say that it would be under a much better law of Entail for the community at large, and equally good for the support of the aristocracy of the country as that which does prevail there.

From your Lordship's knowledge of the practical effects of the English law, and knowing that from time to time, it is possible to put an end to Entails existing in England; is it within your Lordship's knowledge, that when that takes place, there is a general arrangement made to meet the peculiar circumstances of the family at the time, so as to embrace the interests of all branches of the family?—I believe it is almost uniformly so done; and this was followed in my own case, because all my family property in Norfolk, to which I had the right of succession, was under strict settlement when I came of age. A few years after that period a recovery was suffered, which I conclude the Committee are aware is the mode in England, of barring the Entail, and a resettlement took place, by which a large portion was resettled in the family according to strict settlement, and the other portion was settled upon myself in fee, but subjected to certain family charges. I believe from what I have heard from solicitors of very great eminence in England, who have a great deal of business of that kind passing through their hands, that it is almost invariably the practice in English families to act in a manner somewhat similar.

So that in point of fact, in your Lordship's own case, the most beneficial arrangements were made, taking into view not only the interest of your Lordship who was to succeed to the estate, but of all the younger branches of the family?—I think so undoubtedly.

And that cannot be the case in Scotland where the system of strict Entails is fully enforced?—It appears to me quite impossible.

Your Lordship has stated, that in your own case you possessed peculiar advantages with regard to the improvement of your entailed estate, possessing funds other than those derived from the entailed estate, and more especially possessing an estate in fee in England; if your Lordship had not had those advantages, and had inherited your entailed estate in Scotland only under strict Entail, could you with prudence have made a large outlay upon it?—I could only have done so by restricting my expenditure, and making it out of my income; in doing that I could not have supported that station in society which the rental of my estate might have otherwise authorized.

Then the alternative which would have presented itself to your Lordship, would have been, either to allow your entailed estate to remain unimproved, or else to diminish your expenditure to such an extent as would have been incompatible with your station?—I should have had no other alternative, under the assumption that is made, but to raise money at an exorbitant interest.

Had your Lordship, under such circumstances, not made the outlay upon your estate, what would have been the probable effect upon that estate at the present time?—I conceive if I had not made the outlay, that I either should not have let my estate for so much as I have now been able to do, or that I should have had a very inferior set of tenants who might have nominally stated that they would have paid their rents; but who would, particularly under the pressure of the times that we have recently met with, have been in great difficulties, and placed me in the same situation with themselves, to a certain extent.

Would not the result have been, equally if you had taken that alternative, that a comparative degradation of your Lordship's station in society would have ensued?—That would have been the probable consequence.

Judging from your Lordship's own experience and knowledge of the state of the country, do you arrive at the conclusion, that the present state of the law of strict Entail is well calculated to maintain the dignity of the aristocracy and landed gentry of Scotland?—I think it operates in many points of view, disadvantageously for that object; because, as I have stated before, that if entailed proprietors have no other funds but those estates, they must get more or less into embarrassed circumstances.

From your Lordship's experience in England as well as in Scotland, do you conceive that the degree to which alienation of land takes place, is at all equivalent

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to the power of alienating it?—I should say, nothing like it; I think the affection for landed property in England is so strong, that the power of alienating is very rarely acted upon in comparison with the extent of that power.

Is not the use made of that power generally, to borrow money at legal interest on heritable security for the purposes of outlay on the estate, which outlay in Scotland under a strict Entail, can only take place by money borrowed at annuity interest?—Certainly; I should say that that is probably the case in nine times out of ten.

And probably, therefore, in that same proportion, if the power of sale were given it would be only a substitution of money borrowed on heritable security, for money borrowed at annuity interest?—Yes; I think that in the event of a proprietor in Scotland having the power of selling a portion of his estate, he would more probably raise money upon that portion, than sell it for the sake of realizing the sum wanted.

Has your Lordship any opinion that the attachment to the patrimonial estate is less strong in Scotland than in England?—I should say, certainly, that it is quite equal; perhaps, in some parts of the country, still stronger; so far as local attachment goes. I think the desire to be a landed proprietor in Scotland is quite as strong as in England.

Therefore the moral check against the frequent sale, in case a power of sale were given in Scotland, would be at least as strong as it has practically proved to be in England?—From any knowledge I have of the fact, quite as strong, if not stronger.

Has your Lordship formed any opinion as to the comparative difficulty of making an adequate settlement by an heir of Entail upon an advantageous marriage in Scotland, as contrasted with the facilities which a father and son possess of making such a settlement under an Entail in England?—Practically speaking I have not; but I think it must be obvious, that where the proprietor of a strictly entailed estate in Scotland, has no power but what either his own deed of Entail, or those Acts which have been alluded to give him, that he cannot be in the same advantageous situation in the event of such a marriage, as a gentleman must be in England, who has the power by suffering a recovery, or by those methods which are known in the law of England, of barring the entail to make a beneficial settlement.

Does this obstacle existing in Scotland, check the influx of capital on landed estates, by marriage?—I am not prepared to answer that question; it may be so, but I do not know any instances of it. It has occurred to my recollection, and I may here be allowed to add to my former statement, respecting proprietors of entailed estates in Scotland, who may be affected with burthens upon them; that as several individual Entails confer the power of raising sums of money for younger children to an extent, frequently, I believe as large as that given under Lord Aberdeen's Act; I think in such cases they might be relieved in the same way as is proposed to relieve those who are burthened by the provisions made under Lord Aberdeen's Act; and in this respect I believe it would be only following what is very commonly done in English settlements of estates, where a power of charge is given for the benefit of younger children, and authority conferred either to sell or to mortgage for that object.

If relief were granted under the guards, stated by your Lordship, to heirs of Entail now in possession, and if the Entail itself were held sacred during the lives of all the substitutes now in being, does your Lordship see any objection, in point either of principle or equity, that when the first substitute now unborn comes into possession, he should take the estate in fee?—I do not immediately see any objection to such a plan; but wishing not to innovate upon this subject more than is strictly desirable, I would rather, according to my present impression, in the first act at least not go that length.

Your Lordship would probably regard it rather as a question of expediency than as a question involving any violation of principle?—I certainly am not prepared to say that I think it a violation of principle at all; but I am in some doubt whether it would be expedient, in the first instance, to carry the remedial measure so far.

In cases of rights derived by descent, accompanied with honours or prospective advantages that flow in blood, would not such an alienation as has now been described, be highly detrimental to the family whose entailed property was thus annihilated?—It did not so strike me when the question was put by the honourable Member

Member who proposed it; but it might have that effect if the honours which are now referred to should go down in that descending line.

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Your Lordship is of course aware, that among the old peerages of Scotland, many descend to heirs general?—I am aware of that fact.

Then supposing the estate should descend to heirs male, the chance is that the honours and the estate must separate under the existing law?—If the Entail is to heirs general, and the honours to heirs male, or the reverse, the estate would separate from the honours.

Therefore the inconvenience alluded to in last question, might arise either under the law as it now exists in Scotland, or under the introduction of a more limited mode of Entail as supposed by the former question?—It would arise exactly the same under the existing law as under the supposed law, upon the assumption that the honours and the estate are not in the same series of heirs; but where they are to the same series of heirs, which I conclude is not unfrequently the case, the alteration might then be detrimental to those collateral heirs who might succeed.

Is not that always pre-supposing that the heir succeeding in fee, actually alienates the property?—Certainly, it is part of the assumption that he takes advantage of the power, and alienates the property.

Judging from your Lordship's experience in England, and the attachment you have already described to exist to the native soil in Scotland, does your Lordship believe that such alienation, if the power of making it were given, would be frequent?—I think, from what I know myself, which must be very limited, and from what I have heard from others, that alienation takes place either rarely or to a very limited extent, where the descendants who are to succeed are very near relatives; but I am not prepared to say, whether the same would be the case if the descent went to remote connections.

Does not the practical experience of hereditary honours, coupled with hereditary estates in England, both of which have been long preserved in the same families, as far as England, lead, to the conclusion, that such alienation would not take place?—I am clearly of opinion, that in many cases it does so act, and probably in more cases than where it does not. I can speak, of my own knowledge, of one very ancient Peerage in England, where the former proprietor was a very remote relation of the present Peer, who had the power by suffering a recovery, which he did suffer, to alienate his whole estate in favour of near relations of the female line. He left them a certain charge upon the estate; but he devised the whole estate to his very distant cousin who succeeded to the title.

Supposing the probabilities to be as have been stated, that local attachment or feelings of family pride might cause the individual succeeding still to retain the estate, would your Lordship think it right, in legislating and passing an Act affecting property, to leave the fate of that property and the honours of a family to the contingency of what that individual's local or family attachment might be at the time that power was devolved into his hands, by any new Act?—After the practical experience that we have in England upon that subject, speaking prospectively, I should not be in the least afraid of legislating upon the same principles of law as we have seen work so advantageously in this country, without apprehending any of the prejudicial effects of injuring ancient families, which are supposed in the question put to me.

Would your Lordship feel the same confidence in legislating with a retrospective view, that is with reference to ancient Entails, under the Act of 1685?—I think, I have stated in answer to a preceding question, that I am not in favour of going the full length retrospectively, that I have no hesitation in wishing to see accomplished prospectively; I think, in looking to these questions, they stand both upon general principles, and with a view to particular interests on totally different grounds; and with respect to the preservation of territorial property in families of the nobility, I should be very sorry to see any Act of Parliament pass prospectively, even which particularly specified that they were to be an excepted class from the general law.

If with a due regard to vested interests, a retrospective measure can be framed which ultimately will assimilate the law of Scotland to the change you recommend prospectively, would not such an adjustment of the whole law of Entail be considered desirable by your Lordship?—I should like, before any attempt of this sort were made, to see how the prospective law worked when brought into operation, coupled with those remedial measures to which I have adverted. If on the one hand, the prospective law was taken up in Scotland in the same way, and operated

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equally advantageously as the same principle of law does in England, and more particularly if the remedial measures were found inadequate for the purposes which I venture to think they may perform; I should in that case be extremely glad, as a second measure, to endeavour to frame a law by which the whole landed property of the country would eventually come under one system.

With reference to the expression which was used in a former question of "A due regard being had to existing rights;" what, in your Lordship's opinion, would that due regard embrace, which is to cover and protect existing rights?—That appears to me, who am not a lawyer, a very difficult question to answer; because I know there are very different opinions about what are existing rights. I think in answer to a preceding question I have stated as my impression, rather than as an opinion, that it would not interfere with the existing rights, so as to defeat any just principle, if the last substitute in an Entail were permitted to have the fee-simple of his estate; and by the last substitute, I wish the Committee to understand I mean the last substitute now in being; but I apprehend that very few lawyers would agree to such a doctrine; and I confess I entertain considerable doubts, without further reflection, whether this should be permitted or not.

Your Lordship has stated, that you are tenant in tail of certain estates in the county of Norfolk, upon which a recovery was suffered upon your coming of age?—Soon afterwards.

And new arrangements were made at that period?—There were.

From your knowledge of the character of the people of Scotland, does it appear to you, that there is any thing to prevent their making similar arrangements, under similar circumstances as are made in England, when the tenant in tail concurs with the tenant for life in suffering a recovery?—I know nothing whatever that would prevent them; I think there is nothing in the habits or dispositions of the people to prevent their acting in the same manner there as they do in England, in that respect.

It does not occur to your Lordship, that a person in Scotland who might be placed in a similar situation as a tenant in tail, would resist making any arrangement such as is done in this country; so that upon getting into possession of the estate, he might have the whole estate in fee-simple vested in himself, and have the power of disposing of it absolutely?—I do not see why that should be more done in Scotland than in England; there are combined motives in England to prevent that being almost ever resorted to: the one is, the affection that generally prevails between the father and the son; the other, the advantage that is usually given to both in the re-settlement of the estate.

John Ferrier, Esquire, called in; and Examined.

John Ferrier, Esq.

HAVE you been engaged for a considerable time in business at Edinburgh?—I was admitted writer to the signet in 1794, and have been in business ever since to some extent.

Have not you and your family been engaged in administering the affairs of some very large and important properties in Scotland during that period?—They have; my father has been in business for sixty years, I believe, and very much engaged during a great part of that period.

Have you had occasion to turn your attention to the law of Entail in Scotland, in reference to landed property?—I have been led to consider the law of Entail in the course of my practice, and in the course of making Entails for my employers at various times.

Have you not also had occasion to observe the working of that system of law with reference to properties that have been under Entail for considerable periods?—Yes; I have had occasion to see many instances in Entails, of defects and informalities which have led to litigation and difficulties.

Have you been led to form any general opinion as to the tendency of that system of law in reference to the community and the interest of individuals?—Yes, I have; and I am inclined to think that it is a law that requires to be altered; that it is attended with many disadvantages to the community.

Confining your attention for the present to the public interests of the community, will you state shortly in what respects you think that system of law is productive of inconvenience and disadvantage?—In so far as regards the community, I think it is productive of great disadvantage, as it prevents improvements upon entailed estates, in consequence of the want of funds in a great many of the proprietors of entailed

entailed estates in Scotland to improve; and it also prevents lands from coming into the market, and locks up landed property from those who would be disposed to purchase and improve estates if they could acquire them.

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Do you consider that the law of Entail is productive of inconvenience to individuals in possession of landed property, with reference to the substantial benefit and condition of their estates?—I certainly do. I think that in many cases the proprietor of an entailed estate is deprived both of credit and of consequence. In the first place, if he has only an entailed estate and no other means, he can get no money for any purpose whatever, without borrowing upon annuity and insuring his life at a great expense. That has been done very generally in Scotland, and the consequences have been very ruinous to many. With regard to consequence, a proprietor of an entailed estate, however large, has no political influence, he cannot make a vote upon his estate or bestow one upon any of his family, except his heir apparent; he may have other sons, yet he has it not in his power to make any arrangement of that kind.

Are you aware of the statute of 10th Geo. 3, c. 51, which was intended to provide facilities for the improvement of entailed property?—Yes.

Do you consider that that statute has been beneficial in affording facilities which did not exist under the general law?—No, I do not think that it was generally beneficial; a person intending to avail himself of it, if he has no other credit, cannot raise money upon it, except in the way that I have mentioned, upon annuity, or by paying it out of his savings of rents. There are so many forms and niceties in carrying the provisions of the Act into effect, that it makes it very uncertain whether the fund may ever be recovered or not, and prevents the person that advances the money, from being able to raise money upon it in his own lifetime, unless he can insure his life, which is attended with great expense.

Is it your opinion, that the intention of that statute has not been fulfilled; that it has not afforded an adequate remedy for the difficulties of improving property, which it seems intended to provide for?—I do not think it has been attended with that advantage to entailed proprietors which it was intended to afford.

Are you aware of the statute of 5th Geo. 4, c. 87, by which certain powers are given to provide for widows and children?—I am.

Is it your opinion that that statute is likely to be carried into extensive operation?—I think it will; I think that every entailed proprietor will carry it into operation for the sake of his wife and family; but I think at the same time, that it must bear very hard upon the subsequent heirs that succeed to him, and will do so when it comes into operation, which it has not yet had time to do.

What do you consider the effect will be upon each heir as he succeeds to the property, should that Act remain unrepealed and be generally acted upon?—I think the heir of an entailed estate under such circumstances, will come to be put into a very painful and embarrassed situation, and left with an income inadequate to maintain his station in society.

Looking generally at the state of the law of Entail founded upon the Act of 1685, and the two subsequent statutes to which the Committee have now adverted, is it your opinion that the legislature ought to interfere to modify that law?—I certainly do think it would be of great advantage for the legislature to interfere to amend the law of Entail, more especially as I consider the two Acts of the 10th Geo. 3, and 5th Geo. 4, not to be attended with any advantages whatever, but the reverse to Entail proprietors, and are likely to place them in a worse situation than they were before either of those Acts were passed.

Without at present adverting to any specific remedy to be proposed, is it your opinion that such remedy ought to be confined to restrain the power of making future Entails upon the present system, or that it ought also to afford some modification and alleviation with reference to existing Entails?—I am of opinion, that it ought not to be confined prospectively to future Entails, but that some remedy ought to be given under the present Entails, by which the situation of Entail proprietors in Scotland may be benefited and put upon a better footing than at present.

Should you think it desirable, considering that the legislature has recognized the principle of burthening entailed property for the purposes of improvement, and of providing for a family, that that principle of burthening should be commuted by some power of rendering fee-simple a portion of the estate, so that the remainder might descend unencumbered to each heir in succession?—I think it would be of very great advantage if that could be accomplished.

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Is it your opinion, therefore, that the principle, of the party in possession laying his successors under a burthen, either for his family or for the improvement of the estate, is, to a certain degree, objectionable?—I think it is objectionable in so far as it renders the situation of subsequent heirs hard, and takes away a great part of their means of supporting their station as entailed proprietors.

Is it your opinion that the fair and legitimate purpose of restraining the power of heirs of Entail over their landed property, is to give to each heir, as he succeeds, an unencumbered property to sustain his station in society?—That is my opinion.

Is it possible or likely, under the present state of the law, that that object should be obtained?—I do not think it is either possible or likely under the present existing state of the law.

Is it upon that ground that you think some modification of the law is called for?—It is.

In the course of your experience, have you found it extremely difficult to administer the affairs of heirs in possession of entailed estates, beneficially for themselves and for the estate?—I have frequently found it very inconvenient.

From what sources have those inconveniences principally arisen?—From the situation of the entailed proprietor having nothing but his entailed estate, which is very often subject to the entailer's debts and other burthens, and the want of credit in raising money.

Does that observation apply to the circumstance of the situation of an entailed proprietor preventing his improving the entailed estate, or does it apply also to his not being able to make those settlements upon his family, which a person in his situation would wish to make; or does it apply to both?—It applies to both the one and the other; very few entailed proprietors have the means of carrying on improvements upon their estates; I have often found that they have not, or if they have attempted it that they embarrassed themselves and got into difficulties. In other cases I have also found it is very difficult for them to make settlements of any kind.

With regard to the improvement of the estate, have the difficulties been so great, as in your opinion to prevent the improvements being carried on in the way that they would have been carried on, provided the proprietor had enjoyed the estate in fee-simple?—Most undoubtedly; if the proprietor enjoyed the estate in fee-simple, he would have been at no loss to have acquired the money he wanted for that purpose, or any other legal purpose, upon the usual terms of lending money; but as to an entailed proprietor attempting that, it is altogether out of the question.

Then to that extent, as far as your experience goes, it has contributed to prevent the improvement of those estates to which you allude?—It certainly has; and with regard to provisions for families, I have had occasion to see frequent instances where entailed proprietors have been obliged, upon marriage settlements, and on other occasions, to insure their lives at a great expense, not being able to raise money in any other way or to give security.

Are you aware that under the law of England, it generally happens, that upon an eldest son being about to contract a marriage, the estate is in that situation that the father and the son together can make such arrangement as to enable him to make ample provision both for his wife and for his younger children; and also to enable the eldest son to live in that scale of society which he is entitled to move in?—I understand that to be the case in England.

Is that the case in Scotland?—Not in entailed estates.

Then in the case of an eldest son of an entailed proprietor, what course does he generally follow, for the purpose of jointuring his wife, and giving portions to younger children?—He cannot give a jointure to his widow, and portions to his younger children, till he comes into possession of the entailed estate.

Supposing the heir of Entail in possession has exhausted all the powers that the law has conferred upon him, what means are there for the apparent heir to jointure his widow, and to give portions to his younger children?—In that case, I apprehend, the heir apparent can give no provisions whatever.

Neither to widow or to younger children?—Neither to widow nor to younger children when the powers under the Entail are exhausted.

Or under Lord Aberdeen's Act?—Or under Lord Aberdeen's Act.

In that case what does the apparent heir do?—He can only come under a personal obligation and insure his life.

May not he come under personal obligation to do it when he has the power?—Yes; if the father has exhausted the power, the son can do nothing till the burthens imposed

imposed by the father are cleared off, when they are cleared off the son may proceed to make settlements.

What are the means that the heir in possession has of paying off the incumbrances which he has charged upon the estate?—He has no means that I am aware of out of the estate.

Then it must be out of other means that those incumbrances are paid off, if at all?—Undoubtedly.

Supposing the apparent heir dies in the lifetime of his father, what becomes of his younger children?—I am not aware that they would be entitled to any provision whatever.

Then taking into consideration the law of the two countries, which do you think is most beneficial for the estate and for the parties to whom the estate belongs?—I have no doubt in saying, that I consider the law of England far preferable to our law.

Then the apparent heir, unless he comes into possession of the entailed estate, can, in point of fact, make no effectual provision in favour of his widow and younger children?—I am not aware that he can make any effectual provision upon the estate.

Is it not the practice in Scotland, that when a father has got into difficulties in raising money, he generally gets his son afterwards to unite in the securities; by which means the son is implicated to the same extent with the father, so that he succeeds to the entailed estate charged with annuity interest to a great extent?—I understand that it is a practice, but I cannot speak from my own experience.

Is there any possible mode of relief from the burthens now laid upon entailed estates, under either the Improvement Act, or Lord Aberdeen's Act, which can be carried into effect, without a sale of part of the entailed lands, or subjecting part of the entailed lands to be sold?—I am not aware of any.

Would that measure, according to the spirit and meaning of the Acts for entailing estates, and the view with which the same were made, be just to the more distant and collateral heirs who have certain rights in the estate as the Entail at present stands?—I do not think it would be just, if the estate was to descend free of these statutory burthens; but where such burthens exist and would be removed by sale, then I do not apprehend there would be any injustice done.

Do you know of any settlements made under Lord Aberdeen's Act, providing for a widow or providing for younger children?—I do not.

If a jointure is given under Lord Aberdeen's Act, how would you proceed to enforce it?—I would proceed on the statute in drawing the contract; and I would give power in that contract for infeftment, and I would infeft the wife.

Supposing this case, that at the moment of passing an Act of relief for the obligations incurred under the Improvement Act and under Lord Aberdeen's Act, there had been settlements made or obligations contracted under both these Acts, how would you propose or think it expedient, in justice, to deal with such contracts or obligations as were existing at the time that this supposed Act of relief passed?—I think the heir in possession may have the power to sell for the relief of these engagements.

To what extent might that power of sale go?—To the extent that is allowed by the Act under which the obligations were contracted.

And saving all interests of parties who had acquired them under the existing law?—Yes.

Supposing that all Entails, made previously to the date of a new Act regulating the practice of Entails in future, were to be done away upon their coming into possession of the first substitute not in being at the date of the said Act of relief, would such an operation be just in regard to all other substitutes that may have been born in the intermediate time?—I do not think there would be any injustice in that.

Have you any respect for rights that are supposed to be vested in persons not in *esse* but in *posse*?—I have very little.

Is that a matter of opinion of your own, or do you give it as a legal opinion?—If an Act is passed in the terms which have been referred to, that the Entail shall terminate upon the death of the last substitute in existence at the time; I do not see but what he must come into possession of the estate in the same way as if he was the last substitute under a strict Entail.

Would it not defeat the original intention of the person that entailed the estate, which was, to give it in perpetuity so long as the blood continued in the family?—

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In the case of a strict Entail, the perpetuity would come to an end in the person of the last substitute by law; and therefore I do not see the distinction.

Do you mean, under the operation of a new law to be passed?—I do.

Would that be reconcileable with the old law of Entail that is to be done away by that new law?—No; I do not think it would be reconcileable with the old law of Entail.

Therefore, are the Committee to understand it to be your opinion, that the substitution of a new law, which limits the powers of the existing law, would be injurious to families who have rights under the law as it now stands?—Certainly it might; but depending on circumstances.

Are you aware, that in Scotland titles and estates might come to be separated, supposing the Entail was to die off with the last substitute now alive?—I am aware that such a circumstance might happen.

In that case, might not a Peer of the realm, instead of holding an independent existence, fall into poverty?—It is a possible case.

That supposes the limitation of the Peerage and the Entail to be co-extensive?—Yes, a Peer might succeed after the estate was gone; at present he is secured by the strict Entail, if the estate and the title are in the same line.

Is it not possible under the existing law of Entail, that the line of descent of the honours and the line of descent of the property may be severed?—No doubt it is, and I know cases myself where that is the case, where the estate goes to a person not having the title.

So that that event which would be possible in the other case, actually takes place occasionally now?—It may take place now.

According to your knowledge of the Entails in Scotland, what are the cases now existing in which the title and estate might be separated?—A person making an Entail, settles it first upon his own heirs male, then upon his heirs female; his heirs female may not be entitled to the honours; the honours may go away to a remote relation; and I know cases where that has happened.

So long as the male branch is not extinct, the honours and estate continue to be combined?—They go together of course.

Supposing a new Act were made, by which the expense of improvements and provisions for younger children were to be allowed to be taken from entailed estates retrospectively; in what manner do you think that could be done with the least dilapidation possible to the estate; the question refers to existing burthens?—He ought to prove the extent of those burthens to the satisfaction of the court, and be allowed to sell what shall be considered least prejudicial to the estate, or to borrow money and give a valid security for it to the amount of the debt.

At present an heir of an entailed estate is liable to the burthens left upon it under the two Acts of the 10th of Geo. 3, and the 5th of Geo. 4, to the extent of being deprived of two-thirds of the free rents of the estate; what do you consider to constitute free rents upon an estate in Scotland?—I think that the true definition of the free rents are, under the burthens of the land tax, ministers stipends, school salaries, feu duties and assessments for roads under the Acts of Parliament.

Do you consider that it would be more advantageous to an heir of Entail succeeding, to leave him under the operation of the two Acts that have been recited, if settlements or debts were laid upon the estate under both those Acts; or would it operate as a relief to him to have the estate freed, even supposing that he received it diminished in quantity and in rental?—I can have no hesitation in saying, that I think it would be much more for the advantage of the proprietor to take the estate diminished in point of rental and extent, than to take it burthened under the provision of those two Acts of Parliament.

Do you not consider that Lord Aberdeen's Act has most materially interfered with the existing rights of heirs of Entail, and that in point of fact previous to the passing of that Act, every heir of Entail in Scotland was entitled to succeed to the entailed estate, without those burthens which may be imposed upon that estate under that Act?—Most undoubtedly.

Then is not that an interference of the gravest sort with the rights of all subsequent substitutes?—I consider it to be a great interference with the rights of substitutes.

And an interference which will most materially diminish the value of the estates, to which they were entitled to succeed unencumbered, except under the fetters of the

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the original Entail?—It will be, when that Act and the previous Act come into operation, for the time is not yet come when Lord Aberdeen's Act takes effect.

Does not the same principle extend to the Act of the 10th Geo. 3; is not that also an interference with the rights of the substitutes?—It is.

Are you not also aware, that under the general Turnpike Act of Scotland, heirs of Entail in possession are entitled to charge their estates to the amount of one year's income?—Yes.

Is not that also an interference with the principle of the Entail law?—It is.

There is also an Act enabling the heirs of Entail in possession to charge their estates with a certain portion of the expense of building gaols; is not that also an interference with the principleof the Entail law?—It is.

Therefore, in point of fact, the legislature has from time to time interfered with the existing rights of substitute heirs of Entail?—Most undoubtedly.

Is the burthen under the Turnpike Act a permanent burthen upon the estate unredeemable?—It is.

Are not the provisions under the Improvement Act and Lord Aberdeen's Act redeemable; and is not a portion of land appropriated so as to redeem them, and ultimately to free the estate after a certain period?—Yes.

Does it not therefore follow, that the series of heirs who may succeed at a distant period, may still receive the estate by the operation of those redeeming clauses free, and in the situation that the original framer of the Entail intended, when he so destined the estate under the Act of 1685?—No doubt he may.

Is there not a power of charging again under that Act, by the next heir?—Undoubtedly.

Is there not under the statutes of 10th Geo. 3, and 5th Geo. 4, a perpetual power to keep up the burthens upon the estate against succeeding heirs, to the amount of nine years rental; to liquidate which charge it is in the power of the parties always to diminish the rental of the heir in possession, to the amount of two-thirds of that rental?—I think there is, with the exception of the outlay upon the mansion-house; which having been once expended and paid, and redeemed, cannot be repeated.

But supposing the requisites of the statute to be complied with, there is a perpetual power of diminishing the income of each heir as he succeeds, to the amount of two-thirds of that income?—There is certainly.

Is not that affected by the existence or non-existence of a widow and a number of children that may be left; the Act only allowing one year's rent to be given for one child, two years rent for two children, and three years rent for three or more?—No doubt it must be limited by the state of the family.

Is it your opinion, that any person who has availed himself of the Acts of the 10th of Geo. 3, and the 5th of Geo. 4, has, by so availing himself of the powers conferred by those Acts, been enabled to invade the rights of future heirs of Entail, contrary to the intention of the maker of the Entail under the Act of 1685?—I think that he has; I think the rights of the heir of Entail have been invaded by those statutes.

Supposing the case put, and that charges which have been made under those two Acts, are redeemed in the mode pointed out; is not that an invasion of the rights of the heir of Entail in possession, inasmuch as you take out of his pocket the means of redemption which he ought, if those Acts had not passed, to have had to spend?—Undoubtedly.

Then if the redemption is acted upon, you interfere with the vested interests of the nearer heir of Entail, for the purpose of saving the vested interests of the more remote heirs of Entail?—Yes.

According to the view you have taken of a Scotch Entail, has the person who originally destined the estate in framing the Entail, shewn any partiality to the nearer heirs of succession over the more remote ones?—I am not aware that Entails bear any intention of favouring one set of heirs more than another.

Are you aware of a statute passed since the year 1685, enabling heirs in possession to sell superiorities to their vassals?—I am.

Do not you consider that an infraction of the principle of the Act of 1685?—Undoubtedly; at the same time the prices of the entailed superiorities must be laid out in the purchase of other land or in paying debts affecting the entailed estate; so that you cannot say that it injures the entailed estate; because the prices must be paid to trustees, and applied by them in paying debts affecting the entailed estate or in adding to it.

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Is not it an alienation of the property originally tied up, under the statute of 1685?—It is an alienation of the superiorities undoubtedly.

But whatever benefit arises from such sale is restored to the estate, and descends with it to the next heir of Entail with the land?—Yes.

Or, it may be applied to paying off debts?—It may be applied to paying off debts affecting the entailed estate not improvement debts.

Upon the whole should you say, that Lord Aberdeen's Act, as affecting the immediate interests of the heirs next in expectancy under the statute of 1685, was a greater infraction of the principle of that statute than any contemplated alteration of the law, which should preserve the Entail in force during the lives of all heirs of Entail now in being, and conferring the power of sale upon the heirs of Entail not in being?—I consider that Act an infraction of the principle of the Entail law; and very prejudicial to the heirs of Entail that may come to be affected by it.

Do you apprehend that a person who makes an Entail, proposes to himself to secure the estate he entails against being encumbered by debts, so as to leave a free income for the enjoyment of each succeeding substitute?—I understand that to be the meaning of Entails; and they very often set out with it as the cause of granting the Entail.

When the legislature passed Lord Aberdeen's Act, was it not a direct and specific interference with the intention of the entailer, and with an intention probably expressed upon the face of the Entail itself?—It certainly was; it appears to me to be something in the nature of a supplementary Entail; it proceeds upon the ground that they do not allow the thing to be done; and it is to remedy what has not been done, that the statute is passed.

Is it not saying, in other words, the entailer has not done justice; therefore, we, the Parliament, will do it?—It certainly bears that meaning.

Do you see any material difference in the advantage to the substitute heirs, between vesting the money arising from the sale of property, whether of superiorities or of land under an Entail, for the benefit of future substitutes, and applying it for the redemption of debts affecting the entailed estate?—I think it is precisely the same.

Mercurii, 8° *die Maii*, 1828.

THOMAS FRANCIS KENNEDY, ESQUIRE,

IN THE CHAIR.

Sir *James Wellwood Moncrieff*, Baronet, called in; and Examined.

Sir *J. W. Moncrieff*, Bart.

8 May 1828.

YOU are Dean of the Faculty of Advocates in Scotland?—I have that honour.

The Committee being aware of your great practice at the bar and experience in the law of Scotland, and your being especially conversant with important questions affecting the law of real property, are desirous to learn your opinion respecting the Law of Entail in that country; will you therefore be so obliging as to state whether you think that the law of Entail in Scotland is a beneficial system of law, or otherwise?- That is a question which it is very easy to answer in general terms; but to answer it very particularly, involves a subject which is very wide and extensive. I am most decidedly of opinion, and have been so for a great many years (which opinion has been confirmed by all my experience) that the system of the law of Entail, as it at present stands, is highly inexpedient and attended with many very serious evils to the country.

Do you consider it to be a bad system of law with reference to the interests of the community, of individuals, or of both?—I think that it is injurious in both views.

Do you consider that the Scottish law of Entail carries the principle of restraint in the settlement of property, to too great an extent?—I think that it certainly does. In principle it is not very easy to find any grounds, on which such complete perpetuity as a Scotch Entail attempts, should be permitted in any country, more especially in any country which is at the same time a state with an aristocracy and

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with extensive trading and commercial interests, which are necessarily connected with real estate and with the desire of the acquisition of real estate.

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Do you state your opinion of the law of Entail, with reference to the law established under the statute of the Parliament of Scotland of 1685, c. 22, or taking into view also the statutes of 10th Geo. 3, c. 51, and 5th Geo. 4, c. 87?—The principle of a Scotch Entail is, that although the proprietor who is in possession of the estate is what we call liar or proprietor, yet that he may be restrained in the exercise of the powers of a proprietor, merely by certain clauses inserted into the deed of Entail, which though they do not divest him of the property to any extent, yet lay him under a restraint by obligations, and by dangers held out to him by the Entail in favour of the substitute heirs. It is a question which has been much agitated, both at an early period and at a late period, whether such an Entail could be made effectual, so as to affect third parties contracting with the proprietor without the authority of the statute, because if a person be recognized in principle as the proprietor of an estate, it did not appear consistent with fundamental principles, that in the exercise of the powers of a proprietor, such exercise should not be effectual, at least in reference to the interests of third parties contracting with him onerously; and in order to get the better of that difficulty, certain remarkable clauses were introduced, which we call Irritant and Resolutive clauses, of a very severe nature, whereby the maker of the Entail in order to attain his object, exposes the most favoured heirs in his Entail to an entire forfeiture of the whole estate in favour of unknown substitutes, in the event of their doing any thing contrary to that which he is required, or prohibited. Those clauses were borrowed, I believe, from a certain part of the *Corpus Juris*, and they were supposed to have been introduced by Sir Thomas Hope, a great lawyer of an old date; but after all it was considered extremely doubtful whether an Entail so made was effectual. It was indeed found to be effectual in a case of the Viscount Stormont, previous to the Act of 1685; a case, however, which is of very doubtful authority, because it really did not contain the necessary clauses which were and are held to be indispensable. In this doubtful state of the law, the Act of 1685, c. 22, was passed. The object of that statute I conceive to have been twofold: *first*, to remove all doubt as to the competency and efficacy of an Entail so made with prohibitory and with irritant and resolutive clauses, and declaring, that an Entail thus framed under such conditions as the maker should think fit, should be effectual against all parties: But the *second* object was to secure third parties transacting with the heir in possession, creditors or purchasers, against the efficacy of the Entails so made, unless two things should attend them; the *first* was, that the original Entail should be produced to the court of Session, and should be recorded in a special register appointed for the purpose, to which all the lieges should have access; and the *second* was, that all the clauses of restraint should be inserted *verbatim* in every succeeding title of the property, and specially in the instrument of sasine, that is, the instrument of infeftment, which, in order to be effectual, must be entered in the public register of sasines, under the statute of 1617, chap. 12. When those requisites have been complied with in terms of the statute of 1685, the Entail is effectual, not only in any question among the heirs, but against all third parties transacting with the proprietor in possession. Now this being the state of the matter under the Act of 1685, I am of opinion that it introduced a very extraordinary system of law; in the first place, creating an *absolute perpetuity* of all land that should be put into that condition, if it were effectually done; and, in the second place, doing so at the expense of very great hazards, both to the most favoured heirs, and to the public. In the first place, proprietors who held estates under such terms, might obtain credit, or might induce persons to transact with them, notwithstanding all those precautions, in ignorance of the true state of their titles; and, in the second place, it was only accomplished at this expense, that if the proprietor in possession, the individual favoured by the maker of the Entail, should commit any act that a court of law should determine to be contrary to the conditions and prohibitions of the Entail, no less means were conceived to be competent for carrying the intended annulment of such acts into effect, than totally to forfeit in his person his whole right in every inch of the estate. Therefore I think that the law under the Act of 1685, was very severe in principle, and from that severity was likely in practice to produce very injurious consequences. So I believe it certainly did; and it was only mitigated by a principle of very strict construction, which the courts of law applied to Entails that were so made, whereby they held that, unless the things intended to be prevented, were prevented in the clearest and most positive terms, and all the clauses expressed without the slightest

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ambiguity, they would not give effect to them, in questions at least with third parties, purchasers and creditors, nor even indeed in questions among the heirs themselves. That principle of strict construction was acted upon, and is still admitted to be the rule of law; although, perhaps, some of us may think that it has been very seriously trenched upon of late years. Now thinking that the system is bad in principle, I further think that it is also plainly injurious in its practical effects, and that in various ways. If it be carried to a considerable extent, it is plain that the whole land of the country might be in a short time locked up, so that no person acquiring property by trade or otherwise; no person perhaps going out of Scotland and realizing a fortune in India or elsewhere; no person acquiring a fortune within Scotland by trade or other forms of industry, would have the means of acquiring a landed estate, to which most such persons look with great anxiety in the progress of realizing such fortunes. Up to the present time it has not quite come to this; I think principally, however, owing to the application of the law of strict construction, by which, in many instances, large estates that were supposed to be put under the fetters of strict Entail, have been occasionally set loose and exposed in the market. But if things were to go on as they are going on at present, I think it is highly probable that in a very short time, if we were not brought absolutely into the condition that no land could be got, there would at least be very little left for competition in the market; for, in every part of Scotland, within these few years, there have been the most extensive districts of country brought into the condition of being held under the strictest possible Entails. That is one view of the tendency of the system. And I need hardly observe, that if this state of things should go to a great extent, few men who had realized fortunes by industry would choose to settle in Scotland, and the general prosperity of the country must suffer; and it is one which very strongly impresses my mind with the inexpediency of it. Another view of it is, that it is undoubtedly prejudicial to the agriculture and improvement of the country. I am not myself an agriculturist, and know nothing of that matter; but it is scarcely necessary to be at all acquainted with it, in order to know that, generally speaking (though liable to exceptions, certainly), looking over Scotland, there is a most marked difference between the condition of estates which have been long held under strict Entails, and those estates which are not so held, but are in the hands of persons that have the free command of them. The difference may be seen even to the common eye; but I believe that to a person in the least acquainted with the proper systems of improvement in agriculture, it is impossible to travel through the country without discovering that marked difference. Then if the case be taken under the Entail law of 1685, there certainly was a great evil to the families of the entailed proprietors themselves. It is hard enough when a man, who is in possession of a large estate, dies, leaving perhaps only daughters and no sons, that his estate should pass entirely from his daughters, and go perhaps to a very distant collateral relation; but as the law stood under the Act of 1685, unless the entailer had inserted into his Entail special powers to make provision for his younger sons or for daughters, if they should not succeed to the estate, there were no means by which he could make any provision whatever for them out of the entailed estate; and then it just depended upon this, whether he was so situated that he should be able to save so much money as to enable him to leave them provided, or whether they should be left completely destitute. The children of a man of large fortune, accustomed all their lives to live in considerable affluence, and educated likewise in such a manner as to render them unfit for doing any thing for themselves, and at the same time unfit to live in the manner in which a person reduced to very small means may be compelled to do; were thus, not unfrequently, left nearly altogether without provision. The Acts of the 10th George the Third and of the 5th of George the Fourth, have done something, or attempted to do something, to remedy the two last evils that I have mentioned. The Act of the 10th of the late King endeavoured to remedy the acknowledged evils, in regard to the agriculture of the country, by putting it in the power of the heirs of Entail to make leases of a certain duration, provided they put certain conditions into the leases requiring the tenants to make improvements. As to that part of the Act, I think that it did to some extent remedy the evil, but only to a very limited extent; and it was so embarrassed by special clauses and conditions as to the method of doing it, that I believe it has not, in practice, been used to such an extent as probably the makers of the Act originally contemplated. The same Act gave certain powers also in the case of a mansion house or other buildings, being required to throw a considerable part of the burthen of those improvements upon

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upon the future heirs, or the immediately succeeding future heirs, to a certain extent; but then it trammelled those provisions also with conditions that rendered them extremely difficult to be carried into effect with any certainty; for example, the Act requires that certain notices should be given to the next substitute heir of Entail, before the improvements are made. This may be easily done where you are quite sure who the next heir of Entail is, and he is resident in Scotland; but it is often attended with considerable difficulty, especially in the case which is contemplated in the Act, of the person whom you believe to be the nearest heir being abroad. Then you are required to give notice to the nearest agnate of that person who is in Scotland. Now when you look at the Entail, you may see what the next substitution is, what the next class of heirs is, and you may know that that class of heirs are resident abroad, but you cannot exactly ascertain, with any certainty, whether they are all alive. A man goes abroad, and you know that he has a family of so many sons, but you are not certain how many of them are alive, or which of them is the eldest in existence; and then supposing you ascertain that, you have still to get at the second point, who is the nearest male relation by the father who is in Scotland. I knew a case, in which a tenant of a farm made a transaction with the heir in possession of a most onerous nature, by which he agreed to advance a large sum of money upon buildings on the estate, upon the security of the provisions of this Act of the 10th of George the Third; he did advance his money and made the buildings; all the notices were supposed to have been given in the most correct manner, all the accounts were duly registered; and after the death of the heir of Entail, the next heir said, The person to whom you gave notice was not the nearest substitute heir, for a nearer heir existed in America, one of the sons of a person who went there many years ago, and though the person to whom the notice was given may have been the nearest agnate of that in Scotland, the notice was not given to him in that character. The next substitutes were in America; they were known to have existed, and it could not be shown that they had all died or when they were extinct. Supposing them to be still in existence, the person to whom the notice had been given was in point of fact the nearest agnate; but then the notice given was given to him not as the nearest agnate of the heir abroad, but was given to himself on the supposition that he was the next substitute. The notice was expressly so framed, and upon trial the court of Session determined that that was a fatal objection; and the tenant lost his money; he had given the notice to the right person, but he gave the notice to him as next substitute of Entail, and not as the agnate of the person in America. That I mention as an illustration of the extreme embarrassment created by these complicated clauses in the Act of the 10th George the 3d. With regard to the provisions for the widow and children, if the Entail contains no power to provide for the widow, or not a sufficient power, and if it excludes the terce, which is the widow's dower, there were no means by which she could be provided for; I hold, that unless the terce were expressly excluded by the Entail, she would be entitled to it; but if it be excluded she must look to some other means. Lord Aberdeen's Act in 1824 was intended to remedy that evil, and it has done so, at least in regard to some individuals of the heirs; it has enabled the proprietor in possession to make a provision for his widow according to the particular terms that are set forth in the different clauses in that Act. I do not think that in that point it attained its object entirely, because it is evident that it may so happen, according to the provisions of that Act, that a man may be so situated that he can make no provision for his wife. As only two life rents are to be subsisting at one time, if there happen to be two life rents subsisting he cannot make a provision; but supposing that it had attained its object in that respect, I think that taken in connexion with the other clauses of the Act, the effect upon the whole was rather to increase the evil than to lessen it; for the clauses which relate to the provisions for the children, go to such an extent, that although they give relief in the first instance, to the person who is in possession of the estate, before the Act has been acted upon, it is quite plain that they must very often do so at the expense of the heir who next succeeds, or the heir who may next succeed to him again; and things may be brought to that state under this statute, and they are so brought, that the heir in possession of the estate has no power to give one single sixpence to his younger children. In the first instance, he may be reduced to one-third of the rent of the estate for his own living, subject to all the charges of management and taxes; and, standing in that condition, he is required to provide and pay, and that at the first terms six months after the death of the previous heir, the whole money that shall be laid upon him in behalf of the children of the previous heirs; and if the money is not so paid, the estate or the

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rents of it, to the extent of the provisions, is put under judicial trust. I apprehend, that when the Act shall have been a considerable time in operation, this will happen very often; and thus when you put the widow's jointure and the provisions for children together, the end will be that where provisions to children have been given to the full extent, no further provisions can be given until these or a part of them are wiped off; the consequence is, that this Act does not accomplish its object, and in the attempt to accomplish it, it puts the heirs succeeding after the first effort, in a most perilous situation, if it does not reduce them to the state of appearing to be masters of a very large estate, while in fact they have not the enjoyment of it. I think I should further observe, that I think the law of Entail is extremely injurious to the state of the country, on account of its *uncertainty*. It necessarily is to some degree uncertain, as it stands at present at least, because in the first place, the Act of 1685, while it lays down no form for making an Entail, allows every man to insert such clauses as he thinks fit; and in applying the law to such clauses as may be inserted, it is to be expected that, under such strict rules as belong to the law of Entails, there will be very considerable uncertainty introduced. That has undoubtedly been so found in practice, for probably the quantity of questions which have arisen upon the construction of particular Entails, and upon the general principles of the law of Entails, exceeds that which will be found in any other department of the law relative to real property at least, or probably any other department, except some of the mercantile branches which will always be the most extensive in every country. I think it is my duty to state, that I am of opinion that that uncertainty of the law of Entails has been greatly increased of late years. I mentioned that there was a principle of strict construction held to be quite settled, under which a good many points had been definitively ruled, and though differences might arise upon particular Entails, and certainly do arise, yet there was something approaching to a system established previous to certain decisions which have taken place in the course of my own experience. I allude particularly to the decisions in the case of Roxburgh, in the case of the Queensberry leases, in the case of Sheucan, and in some few others, which have been more or less connected with these in principle or circumstances. I ought to state, that in those decisions, undoubtedly all those noble and learned persons who were instrumental in pronouncing the judgments in the House of Lords, did most distinctly declare that they had no intention of interfering with the principle of strict construction; but, notwithstanding that, as in some of them at least (the Queensberry case in particular) the decisions were confessed on all hands to be directly contrary to what had been understood to be completely settled law in the precise case, the *effect* has been to shake the principle so much, as to render it a matter of great difficulty for us, who are required occasionally to give advice as to the state of the law, to tell any individual what precisely the law is upon a particular case. I certainly have found it so, and I know that persons of much greater skill in these matters and of more experience, have found it so also. We can certainly form our own opinions upon the principles of the law as we have understood them; but we must of necessity be under great uncertainty as to what the result will be, when we have seen points that had stood unquestioned for a great length of time, overturned, and admitted to be overturned in opposition to that which was previously understood universally to be the law. In making this statement, however, I ought to add, that there are things in the nature of the subject itself, which in my opinion will always expose it to some uncertainty, and which will also at all times give rise to considerable litigation; for, on the one hand, the capricious views which the makers of Entails sometimes adopt, produce questions which could not before have been contemplated, and to which it is very difficult to apply even known and admitted principles. The later decisions with regard to leases, for example, have related to prohibitions, or what were taken to be the same as prohibitions, against *diminishing* the *rents* by taking fines or grassums; but I know an instance where an entailer *prohibited* the heirs to *raise* the *rent*. It was a difficult matter to say what would be the effect of that, and in the end the court held it not to be effectual to prevent the rents being raised generally. In the same Entail, there were clauses requiring that if the heir should cut a tree, he must plant so many trees in place of it: and the question lately arose, What he was to do with the trees after he planted them? whether he was entitled to *thin* the trees for the benefit of the plantation, or if he must, under pain of irritancy, plant so many in place of those he took out, for the improvement of those that were left. I only give that as an example of a capricious Entail; such things are not quite common, but there are other things analogous to it, particular clauses that may be found in a great many

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Entails that do not occur in others; every individual having his own notions as to what he will insert under this extraordinary power of making an absolute perpetuity under whatever conditions he thinks proper.

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What is your opinion of the tendency of the law of Entail, as it exists, in upholding the aristocracy and gentry of the country, in comfort, independence, and respectability?—Certainly there may fairly be different opinions on that question. The law of Entail, supposing the Entail to be made effectually, will preserve a certain estate, a certain piece of land, in a particular series of heirs in perpetuity. But I humbly think, that to answer the question, as to whether such Entails accomplish the object of supporting the aristocracy and gentry in that state of comfort, independence, and respectability, which is desirable in a country like this, a larger view of the subject ought to be taken; for I do not think that the aristocracy and gentry are supported in that condition in which they ought to stand, if the individuals who are in possession of the estate are so placed that they cannot maintain their respectability amongst other persons of the same rank, who occupy similar estates free from the burthens of such Entails; if they are not in such a condition that their daughters may be married upon equal terms with persons who are proprietors of similar estates held in fee-simple; if they are not so situated that they can send their younger sons out into the world with the same advantages; if they are so situated that, upon contracting debts (which men, whether in possession of entailed or unentailed estates, will do) though the proprietors of very large estates, far beyond the value of such debts, they expose themselves to be driven out of the possession of them; and if they dare to attempt any thing else for their relief, to the risk of a declarator of irritancy, by which they may forfeit the whole. It does not appear to me, that if the individuals of such families are so situated, it can be said, that the aristocracy or the gentry is in their persons supported in a condition of comfort, independence, and respectability, in the manner in which I presume the question contemplates. I should have observed before, that although the statute of 1685 has taken strong precautions for making the public aware of the existence of the Entails, yet every body knows, that the proprietor of an entailed estate may contract very large debts, notwithstanding that it is known that the estate is in that condition; in spite of such precautions, even the fact may not be universally known. A person who goes to a tradesman, or who applies to persons in London for goods, or even for money, may be known to be in possession of a large estate, and may obtain such money and such goods; and the creditor perhaps having believed himself to be single, finds at last that he is one of a vast number of persons in the same condition, and that he has no remedy but to adjudge, that is, to attach, by legal diligence the *life-interest* of the heir in possession; and I apply this to the particular point, to which the question relates, in this way, that in very many instances it has occurred, that proprietors of entailed estates, having contracted extensive debts of this kind, have no other remedy but to convey their whole life-interest in the estate to a trustee for creditors, often with little or no hope of the debts being paid in all their lives; and there is no resource left to them but either to leave the country altogether, or to be confined to some very trifling portion of the rents of the estates during the whole period of their lives. In many instances, some such result as this has occurred, where if there had been a power to sell even a small portion of the estate, the individual would have been at once relieved, and a good and substantial estate would have been left to the succeeding heir, and left in a better condition, and of more real value than he probably may get the whole at last.

Is it in the power of an entailed proprietor to administer his estate beneficially, and, according to law, in times of fluctuation in the value of money and the price of produce, such as we have seen, and which may again recur?—I humbly think that we may be placed in great difficulty in doing so.

Is it not common to insert a provision in Entails, that land shall not be let at a less rental than either that which was paid at the time of the making the Entail, or at a less rental than at any time may be the amount of the rental?—I do not remember to have seen many Entails where it was required that he should not make it at a less rental than as it stood at the date of the Entail; but it is a very common provision, that he shall not let at a less rental than that which he found at his succession to the estate, or at a less rental than that in the former lease; at least so we had understood very common clauses prohibiting the heir to grant leases with diminution of the rental. But in the Queensberry cause a different construction was put upon those words, *diminution of the rental* having been held to signify, not the rental as it was in the former lease, but the rental as it could be got, the *best rent* that

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could be obtained. There are however a number of Entails which exclude that construction altogether, by expressly bearing that he shall not grant leases with diminution of the *previous* or *former* rent.

What must have been the effect of such a provision upon entailed proprietors, with reference to leases let during the war at war prices, taking into view the subsequent alteration of the value of money and the depreciation of the value of farm produce?—That difficulty has often been suggested in the discussions upon these questions; and the only solution of it that I am aware of is, by stating that in such a case, the heir of Entail, if he cannot get the rent which was paid under the former lease, must fix and ascertain the fact, that he gets the highest rent that can be obtained, by making the lease by public auction. At the same time I believe that every person acquainted with the subject, holds, that letting by public auction is in general a very prejudicial method, because you are obliged to take the tenant who may bid the highest rent, when in point of fact the *less* rent may be the *better* rent.

Is there not a constant effort upon the part of heirs succeeding to an Entailed estate, to discover some imperfection in the deed of Entail by which they may be relieved from the restraints of that deed?—Undoubtedly there is; I say that, not only upon the public attempts which have been made to get rid of the restraints of an Entail, sometimes successfully, at other times without success; but I can state it also upon the personal knowledge of a great number of instances in which I have been myself consulted by heirs of Entail, or by creditors of heirs of Entail, with the sole view of discovering whether there is any defect in the Entail.

Does not such effort on the part of heirs of Entail indicate that such restraint is unnatural, and inconsistent with the legitimate freedom of each possessor of an estate to administer freely while alive what he may possess, and to leave the same freedom to those who may succeed him?—I am of opinion that it is. I remember an observation of a great law authority, the late Lord Meadowbank, upon the subject, (which I think is in one of the reported cases,) That he thought that the earth was given for the enjoyment of the inhabitants of the earth for the time; and that it was contrary to principle, that the men existing in one generation should tie up those who were to succeed them in the use of such property in all future generations.

Do you consider that a milder system of restraint might serve all the useful purposes of settlement, so as to guard against dilapidations, and at the same time not excite the perpetual effort to shake off the whole system of restraint as it applies in each individual case?—In point of private opinion, I certainly think that it might; and, judging from what, upon information and not from personal knowledge, I believe to be the condition of such property in England, I should suppose, upon that experience that the object may be sufficiently attained without all those embarrassing restraints which exist under a Scotch Entail.

Does it not frequently happen, that a person making an Entail by attempting to tie up his successors with great strictness, consequently rendering strict interpretation necessary, loses his whole object, even for purposes of a legitimate kind; the whole deed being found unavailing and ineffectual?—It certainly has very often happened, and it arises necessarily from the nature of such deeds. If it were deemed expedient that such strict Entails should exist, I think it would be much better that a single precise form should be laid down in few words, by which a man might say at once, that he meant to entail his lands, and then the law would give effect to it according to the statute which fixed the rule; we should in that way avoid a great deal of litigation and a great deal of uncertainty, and we should avoid that evil which is pointed at in the question, of legitimate, fair and proper objects being defeated by the anxiety to insert whimsical clauses and very strict provisions.

Would the statute be specific enough for that purpose as it stands now?—I think not; because the statute requires, as matter of necessity, the irritant and resolutive clauses; it gives the power to insert such clauses as the entailer may think fit, and therefore you must always look at the Entail for the conditions and prohibitions themselves, and you must look to the Entail for the application of the irritant and the resolutive clauses.

Therefore, in order to give effect to your view, it would be necessary to make an essential alteration in the statute itself?—An essential alteration in the statute itself, and in the system of conveyancing.

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Does any insuperable obstacle exist in the statutory law of real property in Scotland, other than the statute of 1685, to a modification of the law of Entail in that country, on the model of the law of England?—I cannot answer that question without making this reservation on my own account, that I do not pretend to be intimately acquainted with the system of the law of England; but, so far as I understand it, I do not see any insuperable obstacle to the adaptation of the *principles* of it to the state of real property in Scotland, except the Act of 1685; but with this qualification, that the *words* or *legal terms* to be employed, shall be wholly taken from the law of Scotland. At the same time, I must recur to an observation which I made before, that it has always been a matter of question, whether, independently of the statute of 1685, an Entail made upon the strict principles of the law of Scotland would not have been effectual, even against purchasers or creditors. I do not myself think that it would; but very eminent lawyers have thought so. It was a disputed question, on the first decision of the case of Agnew of Sheuchan; and certainly the prevailing opinion of the great lawyers who sat upon the bench at that time, was, that except by the statute of 1685, the Entails would not have been effectual against third parties. In later times, some judges and lawyers have held the contrary opinion.

Do you consider that to be an unsettled question?—I must consider it to be unsettled, because it has been delivered from the bench with great confidence in very late cases, that, independently of the Act of 1685, an Entail might be made effectual; but, at any rate, this qualification must be made, that while the statute of 1685 stands, no such Entail can be made effectual against third parties, unless the requisites of that Act be complied with, the registration in the record of tailzies, and the insertion of the clauses in the seisin.

Do you see any difficulty in limiting the operation of the Act of 1685, leaving it in all other matters untouched?—None at all. I think it may be altered and amended, like any other statute, without any inconvenience.

As far as your individual opinion goes, would you see any objection to limiting by law, prospectively, what may be considered the doubtful point of the common law right of Entail in Scotland?—I see no difficulty whatever in limiting it, if the Act of 1685 be repealed.

In principle you see no objection?—None, certainly.

In principle, would not there be an objection to repeal the Act of 1685, as touching the existing rights under that Act?—I understood the question I was answering before, to relate to a prospective alteration of the law, and not a retrospective one.

You have stated, that by the law of 1685, the recording of an Entail is absolutely necessary to give effect to that Entail; when a person holds a property by succession under an unregistered Entail, why does he require the assent of all the heirs of Entail, and a power to be given him by Act of Parliament, before he can sell the property so affected by the claims of creditors?—The estate may be sold without any such consent, if the creditors who have a claim against the estate, in consequence of non-registration, choose to proceed by diligence, by adjudication, to take the estate by the force of the law; if the creditors proceed in that manner, they may take it without any Act of Parliament: but the way in which I believe an Act of Parliament comes frequently to be required, is chiefly on this consideration, that when it is ascertained that the estate is legally attachable for debts, it can generally be sold to more advantage under the powers of an Act of Parliament, than if it were to be exposed to the expense and inconveniences of a competition of diligence by numerous creditors. I may also here mention, that it has been held a doubtful point at present, and it waits the judgment of the House of Lords to settle it, I hope finally, whether where a person is in possession of an estate, the Entail of which is not recorded, or the Entail of which is defective in any of those clauses which are necessary to make it good against third parties, it remains a question, whether, if the creditor takes the estate by diligence, or if the heir in possession sells the estate, and is obliged to convey it to the purchaser, the substitute heirs of Entail have not a claim of damages against him, or, what is equivalent to damages, a right to demand that the price or the value so taken away shall be laid out again for their benefit. In whatever way this may be resolved, when it is ascertained that the debts of the heir in possession are to affect the estate, and it becomes evident that the best way of clearing the estate is to sell a part of it, it has been common for the heir in possession to obtain the consent of the other heirs of Entail, and upon that consent to go to Parliament and obtain power at once to sell, to discharge the debts, and leave the remainder of the estate free.

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It sometimes happens, that a person contracting debts is known to hold his estate under an unregistered Entail; is it according to the fair principle of law that the person giving credit to a person known to hold an estate under such a title, should have a claim upon such estate?—It has always been held to be the necessary consequence of the provisions of the Act of 1685. that unless the Entail be inserted in the register of Entails appointed by that Act, no third person, a purchaser or creditor, is bound to pay any attention to the clauses of prohibition or restraint which it may contain; because that Act declares expressly that if it shall not be so recorded, or if the clauses shall not be inserted in the sasine; the words are, It shall not militate against creditors or purchasers who shall have transacted with the heir infeft. It was very solemnly adjudged in the case of Smollett's creditors, that that principle must apply, even where the debts contracted remained merely in a personal state, without any diligence done to attach the estate before the registration of the Entail. In that case personal debts were contracted by the heir in possession; after he had contracted those debts, the Entail was recorded; and the question arose, whether those personal creditors were, *after* that registration, entitled to attach the estate. That question was argued very solemnly; and certainly at the bar, it was considered a very untenable proposition that the creditors could be excluded by the registration, after the debts were contracted. I was in the cause, though a very junior person at the time; but I may state, that Mr. Blair who pleaded the case for the creditors, held the question so entirely in contempt, that he would scarcely argue it at all; and Mr. Clerk, who was upon the side of the heirs of Entail, did certainly say to myself, that he really did not know what to say for it: But notwithstanding that, it is right to say that there were some authorities of weight against it; the late Lord President, Sir Ilay Campbell, having held that it was incorrect; and the present Lord President, I think, concurred with him; but the whole of the rest of the court, then fifteen Judges, were quite clear upon the point, and it was so decided.

You have stated, that one great evil attending the existing state of the law of Entail in Scotland, is its uncertainty; do you conceive that this point with respect to an unregistered Entail, is a point settled beyond all possibility of doubt?—I should certainly so say, if it were not for some doubts created by the case of Sheuchan; at the same time, I do not consider it in the least doubtful notwithstanding that case; because I apprehend that that case of Sheuchan, could scarcely be supported except upon one principle, on which it was expressly rested by the noble and learned Lord who decided it; that the making of the two Entails, was by an onerous contract. In the marriage contract of a son and daughter two parties bound themselves to entail their estates severally; and the House of Lords held that that being an onerous contract, the heirs of the marriage who were entitled to the estates severally under that arrangement, were to be considered to be as much creditors as any other third parties could be who contracted with the heir in possession. Upon that principle they held, that although the Entail was registered but no enfeftment had passed upon it in that particular case, the Entail was effectual against the personal creditors; because enfeftment upon the Entail passed before they had attached the estate by diligence, so as to obtain a lien over it.

Was not this principle decided in the Sheuchan case, that the heirs of Entail were to be considered as creditors having a right to demand that their rights should be completed; and if their rights were completed before an adjudication was led by the creditors, that the Entail was effectual against the creditors, and the estate could not be attached?—I do not think that that principle was decided to any other extent than that, in the special case of two onerous Entails being made under a marriage contract, that effect should be produced. I think it would be very dangerous to consider the decision upon so special a case as that was, where the noble Lords, who delivered their opinions upon it, rested so much upon the onerous nature of the Entails in their original formation, as establishing a principle which would at once go directly contrary to the decision in the case of Smollett.

Does not a doubt still remain, whether gratuitous Entails are effectual against the personal debts of the entailer?—I do not conceive myself, that there can be any doubt whatever that a man cannot gratuitously make an Entail of his own estate, to exclude his own creditors.

Was not the distinction pointedly drawn in the decision of that Sheuchan case by Lord Eldon, between onerous Entails, which he considered those marriage settlements to be, and gratuitous Entails; and did not he leave the point cautiously open in respect of gratuitous Entails?—I think that Lord Eldon, in his judgment, left the

matter

matter open; and, in consequence of its being so left open, I believe that the point is in agitation at this moment in more than one case.

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Is not there the case of Glassford, where a point of this sort occurred?—I do not think it precisely occurred in the Duggleston case. The main question there was, Whether the heir was affected by the restrictions.

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If the creditor, at the time of contracting the engagement, expects to have security over the property and not personal security, is it any great hardship to impose upon him to look at the title under which the person holds the estate?—It would be no great hardship if it were once settled that in point of principle you could make such an Entail without the statute; but the statute, according to my view of it, first made it competent to make an effectual Entail of this sort to all the purposes contemplated, and then annexed the condition to it, that there should be this publication for the safety of the lieges; and I cannot but think that if it was wise to do the one, it was very necessary to do the other, because although a person may look at the title of a man with whom he transacts, unless the clauses were inserted in his title, and unless there was some register to which the party could go, it would very often happen that a very honest fair dealing creditor would be entirely deceived and contract in the dark.

You were understood to say, that the rigour of the Scotch law of Entail as it stands in the statute book, was mitigated by what you termed the strict construction of the courts of Scotland; has that construction on the whole, been recently given to such cases in the House of Lords?—I believe I mentioned that I thought the principle had been supposed at least to have been considerably trenched upon by certain late decisions in the House of Lords. Undoubtedly it was always declared there, that there was no intention to interfere with it, and that it was after giving the benefit of strict construction, that their Lordships came to the conclusion they did, in the particular cases; but in spite of that, and very naturally, as those decisions were confessedly contrary to what was understood to be completely settled law in the particular cases, particularly the case of leases with grassums, it certainly has had the effect of producing an impression, that the strict construction is not to be applied so uniformly as it was previously.

Then inasmuch as the tendency of the strict construction by the courts in Scotland was to mitigate the rigour of the Entails under the statute of 1685, the more lax construction put upon them by the House of Lords, has a tendency in an opposite direction?—Certainly it may tend to settle the particular points that are in agitation. The decision of the House of Lords upon one clear definite point will settle that point; but, in settling that point, it may unsettle in principle a great many other cases.

Do you recollect at what distance of time the heir who succeeded in the Roxburgh litigation, had branched off from the original stock under which the Entail was created?—The clause of destination in the Roxburgh Entail, upon which Sir James Innis succeeded, was a destination to the eldest daughter of Harry Lord Kerr, who was the son of Robert Earl of Roxburgh, who made the Entail in 1648; the Entail was made in 1648; the first heir of Entail was Sir William Drummond, and he married the eldest daughter of Harry Lord Kerr, who was then existing. Harry Lord Kerr had four daughters, the descent went to Sir William Drummond, and came down from him and his wife, the eldest daughter, to William Duke of Roxburgh, who died in 1804; and then Sir James Innes drew his pedigree from the third daughter, being obliged to go back to about the year 1648.

Does not that present an instance in which a property has been maintained for the support of a title, according to the original intention of the person who so destined it?—I think it does.

Does not the decision of the House of Peers, upon the feus or leases by which it had been intended to deprive the Duke of Roxburgh, who succeeded of the enjoyment of that property, shew an intention, or at least a desire, on the part of those who gave the judgment, to preserve the property to the series of heirs undilapidated according to the original intention of the entailer?—The case of the Roxburgh feus depended on a special clause in the Entail, which permitted the heirs to make feus of such parts and portions of the estate as they should think fit, provided that the feu duty payable should not be less than the rental at the time of the heir's succession. The Court of Session and the House of Lords both held, though the Court of Session was originally very much divided upon it, that the feus were not made in conformity to that clause, and therefore they

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were reduced. That certainly had the effect of leaving the Duke of Roxburgh in possession of the property of the land, instead of having only the right of superiority with the title to those feu duties; which feu duties, however, would have amounted to a very large revenue, probably nearly equal to any rent which has yet been paid. But I cannot suppose that it was from any desire to accomplish that object that the House of Lords decided; I take it for granted that they decided upon what appeared to their Lordships to be the principles of law.

You have adverted to the evils of uncertainty in the law of Entail, is not such uncertainty prevalent to a very injurious extent, in reference to the power of letting leases?—No doubt there is considerable uncertainty in that point. It is very difficult to say upon any *principle*, why nineteen years or twenty-one years should be taken as fixed limits to which an heir not specially restrained should be entitled to let, more than a longer period, or why it should not be limited to a shorter period; and the only solution of this has been, that it is to be taken according to what is at the time a fair administration of the estate; but that, of course, leaves the matter very vague. It is pretty certain at present, that nineteen years would be taken as a proper period, and twenty-one years as the utmost, but whether that would hold in all cases may be doubtful.

Do you consider that uncertainty has been diminished, or increased, of late years upon this point?—It is a little difficult to answer that question, because before any of those questions upon the long leases were tried, there was an impression that an heir not restrained might make a lease for any period; but when it was held that a long lease was to be considered as an alienation in the first Queensberry case, which was called The Wakefield case, in regard to a lease of 97 years, then there was some uncertainty produced by that decision, as to *how much* less than that would produce the same effect, until at last the decisions in the Duke of Buccleugh's cases settled, that it could not go beyond nineteen or twenty-one years; and so far I think the decision brought in some certainty upon that point.

Even after all the decisions that have taken place, may not entailed proprietors be placed in great difficulty in transacting with their tenants, when there arises a question of abating rents under existing leases?—I think, certainly, they must be placed in considerable difficulty, especially where the heir in possession has no means of giving a warranty that is likely to be effectual to the tenant.

Is it possible for a proprietor of an entailed estate to transact with his tenants, for any purpose by which the tenant may be called upon to expend money upon the permanent improvement of the property, and at the same time secure any thing like repayment to the tenant out of the estate?—Only by pursuing the provisions of the Act of the 10th of the late King.

You have already adverted to the statute of 10 Geo. 3; is it on the whole your opinion, that it has answered the good purposes which seem to have been contemplated in the preamble of that statute?—I do not think it has accomplished the object that was contemplated. I furnished to the Committee, on their order, an Extract of the Minutes of the Faculty of Advocates, as to the proceedings which took place previous to the bringing in of that Act; and it is very clear that the lawyers, who then engaged in the consideration of the subject, contemplated a much more effectual remedy than that which was ultimately obtained by that statute.

Is it your opinion that that statute had its origin in the general feeling that prevailed in Scotland about 1764, that very great evils did exist in the law of Entail at that time?—Certainly.

Did the opinions of very eminent persons at that time, point to much greater changes than were then carried into effect?—I certainly think that they did. I may observe that in certain cases it has been expressly decided, that supposing an heir of Entail makes a lease, the rent taken being quite legitimate according to the previous rent, but there is a stipulation that the tenant shall make certain improvements to be repaid at the end of the lease, which is common upon unentailed property, it is ruled that he cannot make that claim against the future heir of Entail if the grantor of the lease shall die; and this has gone specially upon the principle that that would be throwing aside the Act of the 10th of George 3d; that if it had been competent to do so, it would not have been necessary to make that Act, and in that way perhaps that statute may be said to have partly led to the establishment of a principle which would have been doubtful otherwise.

Were the lawyers and other persons whose attention was directed to the law of Entail in the year 1764 and the following years, persons of the greatest eminence and station connected with the law in Scotland?—Certainly. I think the Dean of Faculty

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Faculty was Mr. Lockhart, and I think the Committee that was appointed consisted of the most eminent lawyers of the time.

Should you therefore consider that the proceedings in the Faculty of Advocates at that period, were entitled to the highest respect, as being conducted by persons qualified to form the soundest opinions on such a subject as this?—I do think so. It appears, I think in the Minutes, that the Judges did not think it proper for them to interfere in the matter; so that they gave no opinion one way or another.

Was it understood that Lord Mansfield entertained an opinion dissimilar to that which was entertained by the eminent lawyers of Scotland upon that subject?—I have not any information on that subject.

Is it your opinion therefore upon the whole, with reference to the statute of the 10th of George 3, that it has fallen short of the public expectation entertained at that time; that it has been productive of dissatisfaction throughout the country, and that it has by no means produced the effects which seem to have been aimed at by the eminent lawyers who took up the subject of the Entail law of Scotland in 1764?—I am of opinion that it has to a certain extent mitigated the evils of the previous system in some points, but that it was so confined in its provisions, and so embarrassed with difficulties in the execution of them, that it has fallen far short of the object then contemplated.

You are aware of cases having occurred, where there was a supposed compliance with the provisions of that statute, but where in truth upon the execution of the statute having been subjected to the test of legal investigation, those provisions have not been found to be complied with, and in consequence the parties have been subjected to heavy loss and inconvenience?—I have mentioned one very strong example of that; I have had occasion to see others, but I am not prepared at this moment to mention any other special instances, though I know that the thing has occurred frequently.

With reference to the case you stated, of a tenant being subjected to very heavy expense, in consequence of an error as to serving the notice upon the next substitute of Entail, if the parties in that case had availed themselves of the power given in the 26th clause of that Act, of bringing an action of declarator in the court of Session, would not the judgment of the court have relieved the tenant from the consequences to which he was afterwards subjected?—I think they would have been in precisely the same difficulty in which they were; because that section of the Act says, that it shall be competent to him to bring, if he thinks proper, an action of declarator before the court of Session on a process before the sheriff, in *which he shall call the heir next entitled to succeed* after the heirs of his own body. Now, if they had brought the action of declarator in that instance, the person they would have called was the person to whom they had given notice as the next heir of Entail, and then it would have been found that they had not called the next heir of Entail, and therefore the proceedings in the suit would have been ineffectual.

And then it would have been competent to that individual to have set that aside?—Upon the principle of that decision.

Except with regard to error as to serving the notice, would not an action of declarator prevent any other objections being brought, after the expiration of one year from the date?—I should think, that upon the principle of the statute it ought to do so; but if there were any previous informality, I should be a little afraid of the decision in the case of Sheuchan, with regard to that point where the sale was made under the authority of the court of Session, fully authorized by Act of Parliament; and yet the House of Lords held that the purchaser was affected by the previous defect of form.

Notwithstanding the express provision of the statute, that it shall be final against all parties, if not appealed from within one year?—My own opinion is, that if the declarator were brought, and the judgment pronounced, it ought to be effectual. I have no hesitation in saying that.

If the wrong party were summoned to an action of declarator, the action would be null and void?—Undoubtedly.

Does not this difficulty arise in obtaining the contemplated advantage of that statute, that in every case the money required must in the first instance be found and expended?—There is an evident difficulty in that point, because you cannot give the security till the money be found. They may undoubtedly arrange how the money is to be found: but the party who advances, or becomes bound for it, must always run the hazard, that if in the mean time the heir in possession should die, he would lose his security.

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Are there not instances of very great hardship, where parties possess estates under Entails which may be called imperfect, and which will admit of sale upon the contraction of debt, but where those parties, should they anxiously desire to avoid sale, cannot burthen the estate voluntarily upon heritable security, even where money borrowed upon such heritable security might be expended upon the property with the greatest advantage to its permanent value?—I suppose the case alluded to is, where there is a defect in the prohibition of the power of sale, but the Entail is otherwise perfect. Certainly there are many instances of that kind. The party has then no remedy but to make that which is a good sale, in order to accomplish his object. I know an instance where a gentleman held an estate in that condition; there was a defect in the irritant clause; it was the case of Grant *v.* Dunbar; and he did not choose to sell the estate, but he wanted to give it away from the next heir of Entail, and he endeavoured to make a fictitious sale, transferring it to the gentleman he wished to give it to under burthens; but upon his death, the papers were found which disclosed the state of the transaction, and it was all reduced, as not being a true sale. If he had sold the estate, and had the money, it might have been exposed to a question as to a claim of damages, but the estate would have been gone.

Is not a condition of that sort a most painful one, leading probably either to a sale, much against the inclination of the possessor of the estate, or to severe suffering; while a power of rendering fee-simple a moderate portion of the estate would leave the party in affluence and ease, and enable him to preserve the property entire, and to manage it with advantage?—Where a person is in possession of an old family estate, which he is very anxious to preserve in his family, and finds himself under considerable personal embarrassments, and has no means of improving his condition but by selling the estate, he certainly is placed in a very distressing situation, and it must necessarily lead at last to the consequence of his selling the family estate, when by a power of borrowing he could have saved it to future heirs, and at the same time preserved his own respectability, by paying his debts.

You have already adverted to the statute of the 5th of Geo. 4, c. 87; is it your opinion, that in the event of that statute remaining unrepealed, it is likely to be acted upon extensively by heirs in possession of entailed property?—I think that it will be acted upon to a great extent, and I believe I might say that it has been acted upon to a very considerable extent already. If I was right in the previous observation I made, it will depend upon the contingencies in different cases, what may be the result; but many instances will occur, in which it will be impracticable for *future* heirs to act upon it to a great extent, or perhaps to any extent.

Is there any mode of ascertaining publicly when that statute has been acted upon?—There are no means of publication provided by the Act. Supposing the object of the Act to be right, there is a defect in it towards attaining that object which I have not yet mentioned, and that is, it provides that where a man has a son, he may provide by *marriage contract* for the children of such son, supposing him to die before him; but it does not enable him, if he has not entered into such a marriage contract, to make any provision for a grandchild so situated. Supposing a man has an eldest son, and he is married, and has not made any marriage contract, and the son dies before the father, leaving a daughter, the statute gives no power to the grandfather to make any provision for that child.

Is there any power of making provision for the widow of a son in that case?—I think there is no provision for the wife of the son at all.

Is there in the case of an entailed estate, any power for the apparent heir who stands next to the heir of Entail in possession, to make any settlement upon his wife or children whatever?—The only way of accomplishing the object, is by propelling the succession. The person in possession of an entailed estate may propel the succession to his eldest son, if he thinks proper to *divest* himself, but he must divest himself of the fee. He may propel the succession in a part or in the whole estate, by conveying it to the son and the heirs following him, under all the conditions; and when the succession is so propelled to the person who is the next heir, he may make a settlement in favour of his wife and children.

If the statute of the 5th Geo. 4. be extensively acted upon, especially if coupled with the 10th of Geo. 3, what do you apprehend will be the condition of parties succeeding under the incumbrances so imposed?—The condition of persons succeeding under such incumbrances, may be very various; but certainly they may be brought into a condition in which their only protection will be under the last clause of the Act of the 5th of Geo. 4, so that they may be reduced to a third of the actual rental

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for their own subsistence, with the ordinary charges of management, taxes, and other things; and unless the existing provisions shall be paid, the rest of the estate will be taken out of their hands altogether, and held by a trust under the provisions of the Act.

Do you consider that those statutes are calculated to afford an equal measure of justice to each heir, upon coming into the possession of the entailed estate?—I think it is quite evident, that they are not, especially the last.

Can they be fairly designated measures remedial of the ancient law of Entail?—I think that they were intended to be remedial of the ancient law, and to some extent they have remedied some of the evils of the ancient law; but I am afraid that in remedying those evils, they may have produced others that take greatly from the benefit they were intended to confer.

Supposing the principle of strict Entail to be founded in reason and public benefit, do those statutes proceed upon a departure from such strictness, so as to preserve all the evils of strict Entail, and at the same time render impracticable the attainment of the only benefits which are contemplated under it, namely, the independence and comfort of each generation?—It appears to me, that the principle of those statutes is to preserve the law of strict Entail with many of the evils which I think attend it; and that at the same time, while they profess to remedy some of the other evils, they not only have fallen short of that object, but have rather, in many respects, tended to aggravate the general mischiefs of the whole system.

Supposing the will of a testator, the maker of an Entail, to be entitled to respect and observance; in what point of view do you look upon the powers provided by those two statutes; do they set at defiance such will; and while they do not nominally annul it, do they in fact abrogate the intentions which the entailer supposed he had carried into effect?—In so far as those statutes apply to Entails which previously existed, they certainly do interfere with the powers which the makers of Entails were understood to possess by the law at the time, I do not see any difficulty whatever in the legislature so dealing, if it be necessary in point of public expediency; but at the same time those later Acts certainly do run counter to the views of the makers of the Entails; and while they do so, I do not think that they are successful in accomplishing the object of public expediency, which alone would justify that interference.

Do you consider those statutes to be an invasion of the vested rights of parties possessing valuable and calculable interests in property?—So far as they have gone they certainly do interfere with the *jus crediti* which might be considered to be vested in the succeeding heir of Entail; and the only compensation which he could get for that must be found in the power which he himself would have if he should succeed, of doing the same thing; and in so far as the Acts do not place him in an equal condition with the proprietor first in possession, they certainly do appear to interfere with his vested right, without giving him the benefit that was intended to be given in compensation for it.

Do they not constitute a perpetual power to invade such rights, being always the rights of the persons *most immediately* and nearly interested in the estate?—They certainly do.

Is it not idle to talk of the vested rights of *remote* substitutes being a bar to an improvement of the law, while the more *immediate* and *valuable rights* of *immediate* heirs have been disregarded by the legislature, and invaded to an extent equal to two-thirds at least of the rental of the estate?—It would be great presumption in me to say that it would be idle to talk of such things, but I should humbly think that the reasoning derived from the rights of remote substitutes cannot be very sound, if it would not be sound as derived from the more immediate interests of the next heirs.

Adverting to the present state of the law, but not calling for any opinion as to the nature of a remedy to be provided, is it your opinion that the time has arrived when the legislature ought to interfere, in order to arrest the progress of the existing system of the Entail law of Scotland?—I am of opinion that the time has arrived when the legislature ought to interfere either to correct and alter the existing law as far as it is understood, or at all events to ascertain and fix what the law is. My humble opinion is, that upon considerations of public interest and expediency, the law ought to be very essentially altered.

Should no such interference on the part of the legislature take place, do you apprehend that Entails are likely to be extended over a large additional mass of property as yet held in fee-simple?—I think it is very probable.

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Should the legislature see cause to interfere, is it your opinion that such interference should be directed to arrest the existing system in its prospective operation only, or in some temperate way to affect gradually existing Entails also?—I think that the interference of the legislature prospectively with regard to Entails to be made, would be a great benefit by itself, if it could be accomplished; but I am of opinion that without some relief given to the present occupiers of entailed estates, the remedy would fall very far short of the existing evil.

Then it is *not* your opinion that a system of law, which on the evidence of practical experience is denounced as unfit for futurity, ought to be permitted to endure untouched to the full extent of its present operation?—So far as my opinion may go, I think that it is not expedient that it should continue in its present state even as to Entails already existing.

Could it be advantageous, that a privileged or peculiar class should be permitted to endure under the old system, while another and a better system is alone permitted to be acted upon throughout all future time in the settlement of real property?—I have cast that matter in my mind at different periods; and I must confess, that I am strongly inclined to think that such a system would be highly inexpedient; I know that other persons have thought that such a system might be established, but I confess it appears to me, that it would create a very awkward state of the law in a country such as Scotland.

Then you do not think that any legislative interference which took place, ought to be confined to the system abstractedly, but that some relief ought to be administered to the existing generation of entailed proprietors?—I think so.

You are aware, that the two remedial statutes have conferred contingent powers to burthen the estate for improvements and family settlements to the extent of nine years rent, and that such charges can be paid off only by a sinking fund operating against the heir to a very heavy and injurious amount; should you consider it a just mode of escape from such statutory powers, that they should, once for all, be commuted for a moderate portion of the estate being rendered *fee simple*, and that the statutes should thereupon be repealed?—It is easier to see the evils of the system than to prescribe remedies. I cannot say that I have formed a precise opinion as to the best remedies that might be adopted; but judging at the moment, I am in general inclined to think that the proposition now suggested would answer the purpose as well as any other that I can imagine; but it certainly would lead (and it would be necessary to make up one's mind to that) to the sale of very considerable portions of many of the estates in Scotland. I do not think that that would be any great evil, but others may have a different opinion.

Would it not in many cases, lead to an individual who was in debt, retaining a portion of his estate in fee-simple under mortgage, rather than leading inevitably to the sale of such portion of the estate as might be rendered fee-simple; is not the desire to retain property so strong, that it would be retained even though the power of sale were conferred?—I certainly think so; it would enable him to keep the estate by raising money on the security of the fee-simple part of it.

Would not the practical effect be, to convert the charge that is now paid by entailed proprietors upon personal security at an annuity rate of interest, into a charge upon heritable security at the legal rate of interest?—Certainly.

Would not such a state of affairs conduce most materially to the respectability and comfort of families in Scotland?—It undoubtedly would.

Supposing that a power were conferred to make one-fourth part of entailed estates fee-simple and the power of imposing burthens were repealed, and the remaining three-fourths of the estate were to descend unincumbered, would not the substitutes immediate and remote be gainers by the change?—It is in some sense matter of calculation, but I should think so. Most certainly if they got three-fourths of the estate certain, clear of debts, it would be better than getting the whole encumbered; as it must be under the exercise of the powers of the statute.

Is not the power perpetually to keep a charge equal to nine years rent upon an entailed estate, a heavier charge against all succeeding generations of entailed substitutes, than a power *for once* of rendering fee-simple one-fourth of the estate, supposing it even to be sold; the remaining three-fourths descending in perpetuity unincumbered?—I think it is.

Would not each generation by such an expedient, enjoy independence, and possess an ample means of providing for their families by insurance or otherwise?—I think, according to the extent of free income that a man has, he is always in a better situation to provide for his family by his saving or by insurance.

Veneris, 16° *die Maii*, 1828.

THOMAS FRANCIS KENNEDY, ESQUIRE,

IN THE CHAIR.

The Earl of *Aberdeen*, attending by permission of the House of Lords, was Examined.

Earl of *Aberdeen*.

16 May 1828.

THE Committee are aware that your Lordship is the proprietor of an extensive landed estate in Scotland?—I succeeded to that estate in 1801.

Is that estate held under the fetters of strict Entail?—I may mention, that about half of that estate was possessed by my predecessor in fee-simple, and half under an old deed of Entail, by me; with the exception of an inconsiderable portion, it is all held under a strict Entail.

Has your Lordship had any occasion to form any opinion as to the principle and operation of the law of Entail in Scotland, as established under the statute of 1685, c. 61?—I certainly have attended for some time to the operation of that law, and have been made aware of many evils resulting from it. The situation particularly of an heir of Entail in Scotland, seems to me to be one liable to be exposed to great hardships, and one inconsistent with the public interest. I think that the great hardships of the situation, are those which prevent the heir of Entail in possession from undertaking the necessary improvement of his estate; and also from making advantageous arrangements with the tenantry. I also think, an heir of Entail in possession in Scotland, possesses too much as well as too little power; that his power is great for mischievous purposes, but inadequate for beneficial purposes. The Committee are probably aware, that nothing can be more different than the situation of an heir of Entail in possession in Scotland, and a tenant for life in England. An heir of Entail in Scotland, I understand to be absolute master of his estate; just the same as if he were proprietor in fee-simple, except in so far as he is restricted by the terms of his Entail. I believe in England, it might not be very inaccurate to say, that a tenant for life could do little but what he was permitted; instead of, as in Scotland, being able to do every thing except what he is specially prohibited from doing. It therefore seems to me, that this situation is one which requires legislative interference.

During the period of your Lordship's possession of your Scotch estates, have they required considerable expenditure to be made upon them, in order that they might keep pace with the ordinary progress of improvement in Scotland?—I believe, I may safely say, that no estate in Scotland could be in a more deplorable condition than mine, when I succeeded to it. There was scarcely a single house upon the estate that afforded a decent habitation for a tenant; no inclosures, no draining; in short, no improvement of any description had been thought of for years.

Did your Lordship, in those circumstances, find that the law of Entail presented difficulties to the execution of such improvements as you judged necessary for the permanent advantage of your estate?—I undoubtedly found that it presented difficulties; but they were not difficulties which I found to be insuperable.

But it is the result of your Lordship's experience, that difficulties do present themselves in making the necessary outlay upon entailed property, which would not be applicable to the same property, if held in fee-simple?—Most unquestionably.

Would not your Lordship have been placed in a very painful situation, had you not possessed the means of making such outlay as was suitable to the condition of your estate, and the progress of improvement in Scotland?—Undoubtedly; I was under the necessity of making a very considerable outlay myself, in conducting expensive operations of improvement; at the same time, I must observe that a very large proportion of the improvements which have been carried on upon my estate, have been performed by the tenants themselves, under my superintendence, by means of encouragement afforded by giving up the surplus rents, or by my being personally bound to allow them a certain sum at the termination of the lease, according to the nature of the improvements executed.

Does not your Lordship apprehend that many cases must exist, in which from the absence of the necessary means, proprietors may have been led from the best motives

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to involve themselve in difficulties, even in making the most judicious expenditure upon their estates?—I think that is very likely; and in particular, the difficulty of making arrangements with tenants must have led to very great embarrassment from the change of times and circumstances. It is scarcely possibly to vary those terms which have been entered into with tenants; and in truth, I am not at all certain that in so doing, in the administration of my estate, I may not very freqently have incurred an irritancy, in what I conceive to be a judicious administration of it. At the same time, as I always felt perfectly satisfied that I was administering that estate for the advantage of my successor, as well as myself, I have not been very scrupulous in considering whether an irritancy was incurred or not. I mean, in reducing the rents of tenants according to circumstances; and in not taking the highest rent, when I conceived it for the advantage of the estate not to do so.

Your Lordship is aware of the statute 10 Geo. 3, chap. 25?—Yes.

May the Committee ask, whether or not your Lordship has availed yourself of the provisions of that statute in order to provide the necessary means of improving your estate?—I never have.

Will you be so obliging as to state such reasons as operated with your Lordship to prevent your so doing?—The principal reason that operated with me was, the cumbrous and operose manner in which it was necessary to go to work in order to bring it into effect; one begins gradually, perhaps without forming any definite plan, that is to embrace a great extent of improvement, and I did not find it particularly necessary to avail myself of it. I have carried on my improvements without it; and on inquiry, I found it would be very irksome and troublesome to comply with all the conditions required, and I therefore did not attempt it.

Then the result of your Lordship's experience, with reference to that statute is, that although it was not important to your Lordship to avail yourself of it, that great difficulty would interpose in the case of those persons who might have the greatest necessity for so doing?—It would have been very desirable to avail myself of it, inasmuch as it would have been a great object to me to have been able to charge my estate with a portion of the expenditure necessary for the improvement of it; at the same time, the difficulties attending a compliance with all the terms of the statute, prevented me from availing myself of it, and of course I conceive that those difficulties others must have found, and suffered from, even more than myself.

Therefore the balance of advantage and of difficulty preponderate on the side of the difficulty?—Precisely.

Your Lordship is aware, that in all cases the money required must be found and expended, before even an attempt can be made to secure it under that statute?—I have understood so. That would not however have operated to prevent me from availing myself of it; but the other circumstances I have mentioned, the complicated nature of the conditions required.

In point of fact, your Lordship has expended large sums of money upon your estate in necessary and beneficial improvements, which form no charge upon that estate?—I certainly have.

Does your Lordship consider that you have thereby conferred additional and permanent value upon the property?—I perhaps cannot describe the nature of the additional value better to the Committee, than by stating, that since I succeeded to that estate, I think I have let the whole of it gradually, a portion every year. It so happened, that the only favourable circumstance attending that estate was, that the leases were only for nineteen years; and as they fell out annually, instead of taking fines, as had been the immemorial custom on the estate, I let them at the best rent I could get, under improving leases; and in the course of the last eight or ten years, I have had occasion to renew a considerable portion of those leases which had endured nineteen years; and when I say, that notwithstanding the change of times, and the increase of the value of money, I have had occasion to experience no diminution of rental, I think it must be apparent, that the improvements must have been very great to have kept pace with the change of times, and the universal depression of prices. The actual rental is very much more than double what it was when I succeeded to the estate; of which increase no part forms a charge upon it.

Should your Lordship consider it a just principle that some relief should be granted to heirs of Entail in possession, by which outlay made for the actual benefit of the estate, and for the permanent benefit of those who are destined to succeed to it, should be charged in some shape against the estate rather than against the life-interest of a single individual, who may thereby have been subjected to the greatest inconvenience?

inconvenience? — I should think such a principle was perfectly consistent with equity.

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Should you see any objection to a moderate portion of the estate being rendered fee-simple in order to accomplish that object, the remainder in all probability being of greater value than the whole estate before that expenditure was made?—I have some difficulty in answering that question. I think the execution of such a plan might be attended with considerable difficulty, If I could always be certain that the portion freed from the Entail, was no greater than would compensate the improvement that had taken place, it would be just enough; but I think there would be great difficulty in securing that proportion.

Have you had occasion to form any opinion as to the general condition of entailed proprietors in Scotland?—I suppose we may truly say, that their condition is one of considerable embarrassment and difficulty, compared with that of proprietors of another description; it will naturally be so from the difficulties attending the management of property of that sort. It is a common observation that the appearance of an entailed estate may almost indicate the nature of the tenure, compared with the appearance of an estate held in fee-simple; there probably may be a good deal of foundation in truth for that observation; at the same time I must say, I have seen many entailed estates quite as well managed and in as good condition as any estates held in fee-simple. If I may venture to instance my own, after what I have said, although I am in an unfavourable part of Scotland, which never can be compared with the fertile districts of the South, yet I think I may safely say, that my estate would not lose by comparison with any estate in the north of Scotland, held either in fee-simple or under Entail, with reference to the general appearance of improvement and of good management.

Has your Lordship had occasion to know the state of opinion among enlightened men in Scotland, with respect to the law of Entail in modern times, previously to the bill which your Lordship introduced to Parliament in the year 1824?—I have had for some years a good deal of correspondence and communication with different proprietors of entailed estates in Scotland, and others; and the result of my enquiries is certainly a decided impression, that there is a general wish for some material change of the law as it exists at present. At the same time, although I believe that wish to be general, it is by no means without many exceptions, and I am inclined to think that the greater entailed proprietors generally are less anxious for a change in the law; but that feeling extends itself also to a great many who may be called proprietors of small estates. I have found a large proportion of them as much attached to the principle of the law of the perpetuity of Entail, as many of the great proprietors, arising partly from a sort of vague notion of the value of its being perpetual and secure from all danger; which I take to be a very erroneous feeling on their part, but, however, it is one that I think is pretty largely entertained.

The Committee have had under their consideration the statute 5th Geo. 4. chap. 87, which was introduced by your Lordship to the consideration of Parliament; will you have the kindness to state to the Committee, whether in introducing that measure, you did so under an impression, that great evils existed in the state of the law, which this measure was calculated to remedy on one point only?—I have some little delicacy about stating any thing connected with that Act, which I was the means of introducing into Parliament; but presuming that the object of this Committee is just the same as my own, a desire to improve the law of Scotland as it exists at present, I will state frankly and candidly what I feel upon that subject. The Committee will probably recollect, that in the year 1819, when the final decision took place in the Queensberry causes in the House of Lords, a principle then was established which was at variance with that which had been considered for a long series of years as the established law of Scotland, and which certainly was conformable to very general practice; I mean the taking of fines on the renewal of leases; or the letting of beneficial leases, for the purpose of providing for younger children. That was so universally felt to be the law, that I recollect the opinion of Sir Hay Campbell being quoted, which he communicated to the House of Lords, in which he said, that he believed that no Judge upon the bench, no lawyer at the bar, or no man in Scotland ever thought of entertaining a doubt of that practice being permitted when not specially prohibited. That understanding having been very generally acted upon, it was quite clear that the situation of the proprietors of entailed estates was reduced to one of very greatly augmented difficulty, by the decision which took place in those causes. At the same time I should say, that Lord Eldon repeatedly stated his opinion of the necessity of

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some alteration in consequence, and even promised to undertake it himself. It was to remedy the immediate grievance arising from that decision, which induced me to prepare the Bill that afterwards passed into a law; that Bill received the sanction and approbation of Mr. Cranstown, and of every legal authority of eminence whom I consulted in Scotland upon the subject; and I have no reason whatever to be dissatisfied with the operation of that Act, so far as it has gone; but I must admit, as I did at the time of introducing it, that it could only relieve the present generation, or nearly so; and that it never was my intention that it should form the only measure of relief; and in fact I considered it absolutely necessary to be connected with a general review of the law of Entail in Scotland, with a view to an entire alteration of it. However, I should say, that I think it has been attended with this misfortune, that having relieved the urgent grievance, it has perhaps created some indifference about the general remedy, which I think it is most important should not be lost sight of.

In proposing that change in the law your Lordship did not consider that all the necessary improvement of it was accomplished, but that at a subsequent time it would become necessary, that the general system of the law of Entail should undergo revision with a view to its amelioration?—I stated that opinion very explicitly when I introduced that Bill to Parliament; if I had ever thought of rendering that Act permanent, or at least of its existing exclusively, without connection with other measures, I should have probably been induced to propose, that a portion of the sums charged in that Act, should have affected the fee of the estate; that there should have been a power to sell.

Your Lordship has already adverted to the difference which exists between the power of selling property under Entail in England and in Scotland; without going into detail, is your Lordship inclined to think, that an assimilation of the law of Scotland to that of England in substance, would be likely to be advantageous to Scotland?—When we see the manner in which entailed estates are preserved in families in England, I think that we need have no fear of the preservation of estates in Scotland under some similar mode of settlement; at the same time, I think that there would be great difficulty found in assimilating the law of Entail in Scotland to that of England; the law of Entail in England, in fact, rests upon a series of fictions, and not upon direct statute; for I apprehend, that in point of law the statute *de donis* is exactly in principle similar to the law of Entail existing in Scotland. The fictions which are had recourse to in England, I presume that we could not adapt to our law; and I think there would be considerable difficulty in bringing the law of Scotland to that resemblance to the English law which would put us in a similar situation; but if it could be accomplished, I should certainly think, on the whole, it would be very desirable; inasmuch as I think the practice of the English law of Entail seems to me to be as nearly perfect as it is possible to conceive with regard to the situation of property, combining just a sufficient degree of freedom, with a sufficient degree of restraint and security.

Where the improvement has been conducted by the outlay of tenants, has not the sacrifice of rent been so large as to amount almost to annuity interest on the sums so advanced?—It must vary very much, according to circumstances; I cannot say that I have found the sacrifice to be very large in any case; but that must vary according to the circumstances of the estate.

Have the tenants been willing to make a large outlay, paying the old rent upon a lease of only nineteen years?—They have been most anxious to do so; although I have said, that generally speaking I have met with no diminution of rental, in consequence of the change of times, yet of course, in a large estate, there must be many particular cases in which that would take place; and I found it necessary, from a sense of justice, to do that which I think very likely may have incurred an irritancy of the estate. In consequence of the very spirited and liberal conduct of the tenants, in conducting those expensive improvements, I found myself bound to compensate them for their exertions.

Were those old rents under which they were willing to make this offer, grassum rents?—All of them originally, or nearly so; but I have found the same spirit of improvement under other circumstances.

How did your Lordship provide, in the warranty to your tenants, for the continuance of your life?—By personal obligation, with which they were satisfied.

Had not your Lordship possessed other means than the rent that your unimproved estate afforded, or those given under the Montgomery Act, would not your position have been most painful when money became scarce, farm produce being reduced

reduced in price, the family incumbrances remaining undiminished, and your rental declining?—Undoubtedly that is a formidable picture, and the difficulties would have been very great; however, I must say that the latter difficulty has never occurred. Quite the contrary; my rental has always been increasing annually, up to this moment.

The question contemplated no outlay, it being supposed that there is no possibility of outlay, from no private funds being in the hands of the entailed proprietor, and the Montgomery Act being insufficient?—There would always have been the means, by a sacrifice of the surplus rents.

Would not a sacrifice of the existing rental, to a person filling the high station of your Lordship, have been incompatible with the dignity of that station?—If I had succeeded to the same rental enjoyed by my predecessors, I might have made a sacrifice of a portion of the surplus rent; however, perhaps it is of no great importance, arguing from the condition of one individual estate, but the truth was, that the estate was in such a neglected condition, and so low rented, that an increase of rent took place to a degree that is perhaps very uncommon.

Is not the picture, formidable as it is, described in the preceding question, in fact the position of a large portion of the entailed proprietors in Scotland, without personal means of improving their property?—I should be afraid it is too correct a description.

Does it appear to your Lordship, that such a state of affairs is consistent with the dignity or with the comfort of the aristocracy and gentry of Scotland?—Surely not.

Therefore legislative interposition, to arrest such a state of things, would appear to your Lordship expedient?—Highly necessary.

Was not the great improvement of entailed estates in Scotland coincident with war prices and the abundance of paper money; and has not that improvement begun to retrograde since the fall of prices, and the increased scarcity of money?—I believe that if it did not begin with it; improvement certainly went on much more rapidly under that state of things. That it has diminished recently, I believe is true; at the same time, I should hope it still continues to a certain extent.

Is there not a strong natural tendency, on the part of tenants who make an outlay upon a nineteen years lease, unaided by their landlord, towards the expiration of their term to take out of the estate all the outlay they have made upon it?—I suppose there may be. At the same time, those leases generally are drawn with covenants which insure the due administration of the land, as to the rotation of crops, as well as the whole mode of managing the farm.

In a former answer of your Lordship's, you described the state of management under strict Entail in Scotland to be, that the tenant for life was enabled to do every thing which he was not prohibited from doing; inasmuch as leases upon very lax terms will yield a larger rent, is there not a great temptation to an heir of Entail to exhaust his property by granting very loose terms of management to his tenant?—No doubt there is; and I apprehend that to be one reason of the comparatively inferior condition of entailed estates in Scotland, as compared with those in fee-simple, and particularly under the old principle of law, as it was understood, of the power of taking fines when not prohibited; leaving thereby to the tenant an absolute discretion as to the management of the farm. When I say that an heir of Entail in possession is enabled to do every thing which he is not prohibited from doing by the terms of the Entail, the Committee probably may be aware of one exception, and that is, that he cannot let the mansion-house, or pull it down, although he may allow it to go to decay, or even accelerate its destruction. The principle on which this rests I do not very well know, nor does it seem to be very clearly ascertained by any of the decisions, or in the books; however, with this exception, I believe what I have stated is the admitted principle of the law.

Is not the tendency of such a state of affairs, to produce a progressive exhaustion of the fee-simple value of the estate?—The tendency must be injurious of course to the estate.

When you contrast that with the rigorous Entail for short periods in England where the reverse rule prevails, that the tenant for life is allowed to do nothing which the Entail itself does not in express terms permit; does not your Lordship arrive at the conclusion, that the English rule preserves the fee-simple while the Scotch rule impairs it?—I have already stated a decided preference for the English system as it exists at present. I have only stated a doubt as to the facility with which it might be adopted in Scotland. The whole principle of law being so different;

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different; and the English system not resting on statute, but on fictions, which some have called pious frauds, and others have called astutness. I think it would be difficult to bring the Scotch law practically into the same situation; but at the same time, if it can be accomplished by statute, it would be very desirable. But I think there would be a great difficulty found in doing that by direct statute, which has been done in England by a succession of contrivances, which have long since received the sanction of law.

If those difficulties could be overcome, would your Lordship be of opinion that it would be desirable to extend to Scotland for the shorter period that Entails would then endure, all the rigour and strictness of the English Entail throughout that period, more especially with respect to waste?—I have some little doubt of that; at the same time, I do not find that in England any great inconvenience is found to exist from those conditions; but I have some doubt how far it might be found easy or practicable in Scotland, to extend all those conditions of a strict Entail in England, for the short period for which it endures.

Might not there be great danger in extending partially to Scotland the English system, without adopting it rigorously and entirely, especially since your Lordship has arrived at the conclusion, that as it now exists practically in England, it is nearly the perfection of law?—Very great difficulty indeed, and that I think attends the whole consideration of this subject; for it is one thing to see and to acknowledge the perfection of a system in one country, under a particular system of laws, and to apply it to another where every prejudice and feeling is at variance, and the whole frame of law perfectly different.

Do you consider the situation of a tenant under strict Entail in England, as being in a better situation than an heir of Entail in Scotland?—I do not know that he is in a better situation. I consider that he is so far in a better situation, as he exists under a better system of law; but his powers are evidently in many respects very much less than those of an heir of Entail in possession in Scotland. I have already said, that the powers of an heir of Entail in Scotland, although too limited in many respects, are too great in others.

Except by breaking the Entail, has an heir of Entail under the English law any means of improving his estate during his time?—He has none, but those which he derives from the settlement under which he holds his estate.

You mentioned some difficulties that occurred to you, that would arise in the removal of difficulties attending the Montgomery Act, and particularly by disentailing a part of the estate; do you think that those difficulties would be removed if a provision of this description were made, namely, that the heir in possession should appear before the Sheriff, and should produce all vouchers and documents of outlay, and that he should be allowed to the amount of those, without any of the heirs of Entail being called to object to them; but notice being given to those heirs that such a proceeding was going on?—That might to a certain degree facilitate the operation; but I think even that would be attended with difficulty, and would be liable to many objections.

Has any distinction occurred to your Lordship, between a prospective measure and a retrospective?—I think, that as we could only be justified in interfering with the law of the country, from a conviction of it being contrary to the general interest of the inhabitants, we are bound, upon the same principle, to make it retrospective as well as prospective. I think it would be most unjust and inexpedient voluntarily to leave a portion of the country, probably one-half of it, under a bad system, at the same time that we are taking measures to introduce a better in another.

Do you think that the same measure ought to be applied to the retrospective as to the prospective?—To say the truth, I have not been able to form to myself any satisfactory opinion as to the nature of a measure that should be generally applicable to the whole law of Entail, and therefore I do not know how to answer that question; but I think the principle should undoubtedly be to make its application universal.

Supposing no measures should be adopted by Parliament, is your Lordship of opinion, that leaving the law as it now stands would be productive of very evil consequences to Scotland?—I think it would certainly be productive of very evil consequences; and I should hope that there is little probability of leaving the law as it is at present.

In deciding upon that point, you would be of opinion that a retrospective measure, as well as a prospective measure, should be considered?—Unquestionably; I think

I think that justice and policy demand that the measure should be of a general application, whatever it be.

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You were understood to express a fear how far it would be possible to apply the principles of the law of England to the principles of the law of Scotland; does that apprehension rest upon the fictions by which the English mode of settlement has arrived at its present state of perfection, or is there any thing in the principle of the law of England which you think inapplicable to the law of Scotland?—No, I cannot say that I think there is any thing in the principle of the law, that makes it inapplicable. The difficulty rests upon the technicalities of the law of both countries; I mean, that what is done with respect to Scotland must be done at once, and by statute. That which has been done in England, and which has brought the system, I admit, to a state of perfection which I cannot conceive it possible to improve, has been done gradually, and not by the legislature, but by the interpretation, or exercise of the discretion, of Judges.

Then the difficulties which your Lordship anticipates, relate rather to the machinery than to the principle of the measure?—Entirely so.

Then if any machinery could be contrived, to extend the principle of the law of England to the law of Scotland, your Lordship's objections would be removed?—They would; but a great deal depends upon the feeling which exists in Scotland, independently of any principle of law. There is, in practice, a general feeling, both in the profession and in the country at large, which I think would make it difficult; I will not say, by any means, impossible.

Your Lordship is probably aware, that in all well-drawn English deeds, there is ample power given to the tenants for life to jointure their widows, to portion their younger children, and to let leases with powers of exchange, and with powers to charge the estate for certain purposes; do you see any reason why a Scotch settlement should not contain the same powers?—None whatever.

If such powers were contained in Scotch settlements, would there be any difficulty in extending the strictest construction, as applicable to the estate of the tenant for life, that prevails in England, to the estate of the heir of Entail in possession in Scotland?—I see no difficulty in the principle at all, provided means could be found to render it consistent with the whole principles of feudal tenure, and the transmission as well as the constitution of real rights in Scotland. The whole law, regulating real property in Scotland, seems to me in all its parts to be so different from that in England, that I think difficulties will arise where they are not foreseen, when we look only to the justice of the general principle.

If such power were to be extended to the heir of Entail in possession, do you think there would be any just cause to complain of the alteration of the system, as far as the due administration of the estate went?—As far as regards the principle, it would be impossible, in my opinion, to complain, because I think it is quite perfect. The difficulties that I have alluded to, I am hardly prepared to state in detail; but from the constitution of real rights in Scotland, resting in all their parts on such different principles from those which exist in England, I think I foresee great difficulties in the application of any measure of that sort. They may possibly diminish when it comes to be attempted.

In as far as the preservation of the dignity of the aristocracy is concerned, has your Lordship any fears upon that ground?—None whatever; in fact, the law of Entail in Scotland can hardly be called an ancient law. Many estates have been possessed in Scotland for centuries before the introduction of the law of Entail, as it has existed since 1685; and as we see that estates are possessed in England under a different system, I cannot possibly imagine why they should not be preserved in Scotland, where I believe the attachment to landed property is quite as strong, if not stronger, than in England.

Your Lordship has stated, that when you introduced the Act of the 5th of George the 4th, you considered it as a measure to remedy a particular defect, but not as a system that would work perfectly in itself without some supplementary measures being taken; your Lordship has also stated, that there may be some difficulties in making the system of England apply in Scotland; has your Lordship any suggestions to make of any supplementary measure which you think might be made applicable to the state of Scotland, in addition to that law which your Lordship introduced?—I can conceive several partial measures which might improve the condition of the heirs of Entail in possession in Scotland, and prove advantageous also to their successors; but I have not formed any decided opinion as to the practicability of a general measure, which should comprise all the alterations which may be expedient.

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dient. With respect to the partial alterations to which I allude, I think the power of leasing, and particularly of feuing, might be advantageously granted, by which means the heir in possession might, in many instances, greatly improve the value of his estate; and the feu duties might be secured to all those who succeed him, so that he should receive nothing which his successors should not also enjoy. And under proper regulations, I think, the power of exchanging lands might also be given with advantage to the heir in possession. These measures would also remove the necessity for very expensive proceedings in Parliament; for in fact such powers are always granted, on application to Parliament, although at considerable expense.

Might it tend to prevent persons from granting improper provisions to families, if the heir in possession were bound to find a part of the sum to be settled?—I think that would be a very just provision; and I wished very much to have introduced some such provision into the Act which I introduced; but I found it so difficult, and trusting also that the whole subject would be taken into the consideration of Parliament shortly, I limited myself to the simplest and most direct method of removing the immediate grievance most complained of, and abandoned that attempt; but such a provision would be just and necessary in any powers that were given to the heir of Entail in possession.

With reference to the effect of a retrospective measure upon the nobility of Scotland, at present the titles descend where they are in the main branch, with the property; if any measure was now to take place the tendency of which was to detach the property from the title in the main branch, would it not tend to injure the independence of the Peerage?—If such a measure had any direct tendency to separate the property from the title, unquestionably it would; but I imagine that any measure, retrospective or not, founded on such a principle as that of regular succession in England, would have no such tendency. We do not find that in England estates are separated from the titles; and I do not anticipate any such result in Scotland.

Where the title goes to a series of heirs, many of which are collateral branches who therefore may succeed to the title, and indeed must succeed under some circumstances to the title, although perhaps, at a distant period, and the fee-simple is granted to the direct line now in possession, might it not, as in the case of the Roxburgh Peerage, have had a tendency to destroy the independence of those persons who by law must succeed to the title, being at present collateral branches?—Occasionally families might be peculiarly circumstanced, no doubt, which may lead to the effect contemplated; but I do not think that any change of law, properly guarded, is likely to lead in any considerable degree to such consequences as to make it an object, which should prevent the adoption of that which must be considered as a general advantage.

Your Lordship may probably be aware, that there are estates distinctly settled for the support of the title, that is to say, in families where the old Entail goes to heirs female, new Entails have been created for the purpose of holding to the main line with a view to the support of the title; would it not in such cases be destroying the intention of the person who so secured the property, and the rights of those for whom such estate was originally destined?—I apprehend that any such interference as is contemplated, with the law of Entail in Scotland, must unquestionably completely contravene all the expressed intentions of the original framers of those Entails. It appears to me, therefore, that the legislature can only be justified in interfering with private rights of this nature, from the conviction of the great evils attending their existence. That conviction of course, would justify an interference even to the prejudice of the intentions of particular parties; though I think that in any general measure of this sort, an attention to the interests of all parties concerned, of course will be found a very difficult part of the proceeding.

Have not various enactments passed since 1685, which have in fact been contraventions of the intentions of the entailers, who availed themselves of the power of the statute of 1685?—To a certain extent no doubt, several of the entailed estates are made liable to different burthens; road money, and contributions to different public measures; and they have so far interfered unquestionably, with what may be considered the sanctity of this property, so restricted. But on all those occasions, the interference with private property of this nature, or any other, can only be justified from a conviction of the public necessity and advantage of the measure.

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Therefore any contravention of the law of strict Entail founded on the principles on which the legislature have acted before on this subject, would not be novel as applied to the statute of 1685?—It certainly would not be novel in principle; and even if it were so I should not see any objection to it, but only should regret that it had been so long delayed.

Under the existing law of descent in Scotland, are not the line of descent of hereditary honors, and the line of descent of property, frequently different; are there not many Entails of noble families under which the property descends to the eldest son and the daughters; whereas the title would descend to the eldest heir male?—Such cases may exist, but I should think they are rare.

If a power were conferred to make one fourth part of the entailed estates fee-simple, and the power of imposing burthens were absolutely repealed, the remaining three-fourths of the estate descending unincumbered; would not the substitutes immediate and remote be gainers by such a change?—That must a good deal depend on the particular case to which it is applied, there seems to be some little objection to fixing the precise amount, such as the arbitrary portion of one-fourth; I think, that the portion to be so treated, ought to have reference to the existing condition of each particular estate, and the burthens upon it. I should doubt whether any general principle could apply to all estates, however differently circumstanced.

Would not the practical effect be in most cases, to convert the charge that is now paid by the entailed proprietor on personal security at an annuity rate of interest, into a charge upon heritable security at a legal rate of interest?—I suppose it would have that effect in a great degree.

Is not the power perpetually to keep a charge equal to nine years rent upon the entailed estate, a heavier charge against all succeeding generations of entailed substitutes, than the power for once of rendering fee-simple one fourth of the estate, even supposing it to be sold; the remaining three-fourths descending in perpetuity unincumbered?—Perhaps it may be. The charge of nine years rent might in the course of time, and probably would exist, but at present I think that notion is a good deal chimerical; I do not apprehend that the improvements under the 10th of the late King, and the burthens charged under the 5th of the present King, are at all likely to exist together for some time to come; and I do not apprehend, therefore, that any estate in Scotland is in the situation contemplated by the question. I have myself exercised, although in a very limited degree, the powers granted by the 5th of Geo. 4.

If any increased facilities were given to carry into execution the Montgomery Act, the Act of the 5th Geo. 4 remaining unaltered, an Act which it is most probable the heirs of Entail in possession will avail themselves of; would not this state of affairs almost immediately arise, of an incumbrance to the extent of nine years being cast upon the estate?—I should be sorry to see any change which was limited merely to an alteration of the Montgomery Act; for it was principally to supply the difficulties of acting under that statute, which induced me to introduce the Act of 5 Geo. 4.

Both in the Montgomery Act and in that which your Lordship introduced, there is a provision of a sinking fund for paying off the burthens both of the improvements and the provisions for younger children; is it not therefore probable, that in many instances, the estate may at no distant period of time, become free from the charges incurred under those Acts, and instead of being an estate burthened to the extent of one fourth of its value, it may be positively free in all respects for the heir of Entail next in succession to exercise the same powers?—I am afraid I can hardly be sanguine enough to anticipate such a state of things; at the same time there is no doubt it is possible, and I think the introduction of that principle may do something to alleviate the evil effects of the Act; but if that alone is done without other measures being adopted at the same time, I think it is too much to hope that any sinking fund is likely to produce such an effect.

But still the intention of the sinking fund is to operate in that way?—Undoubtedly it is the intention, and to a certain degree it is probable that it would do so in many instances.

Must not the heir of Entail in possession who provides that sinking fund, suffer considerable oppression?—Very great; and there is no doubt that the subjection of his estate to trustees, whether judicial or otherwise, is a condition which must be extremely painful and disadvantageous to any man, and one that we should be very sorry to see resorted to; but that provision was introduced in order to guard against

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an extreme case, one which I should think was not likely (certainly not in a short time) to occur; that both those Acts should come into full operation.

Would not your Lordship be extremely jealous of any alteration of the Montgomery Act, to the effect of rendering it more easily operative, every thing else remaining unchanged?—Certainly; so much so that if the proprietor could by retrospect have availed himself of the improvements he had made under the Montgomery Act, I do not know that I should have thought it necessary to introduce the bill which I did.

Does not your Lordship apprehend, that even upon the arithmetical calculation supposing the heir in possession were to avail himself to the full extent of the powers of those two Acts, the sinking fund provided by them must be very slow in its operation?—Very slow. I have said that I cannot anticipate any great effects from it; at the same time, it is, as far as it goes, a salutary provision.

Is not the provision of the 5th Geo. 4. imperative, that the rents shall be set aside if necessary, to the extent of two-thirds, in liquidation of the burthens created under the two statutes?—It may be so.

Would it not be contrary to the feeling and to the dignity of the landed proprietors, that their estates should be thus put in trust?—I think it is a situation the most to be deprecated that can be imagined. The existence of that trust was only to prevent a still greater evil, namely, that even by possibility more than two-thirds of the estate might be taken from the heir in possession. If both those Acts were in full operation, they might, in fact, deprive the heir in possession of more than two-thirds of his estate; and it is therefore by the sacrifice of the two-thirds that he is relieved from any greater claim than to that extent. It is to provide against that case, which, however, I do not think likely to occur, and certainly not in any short time, that such a provision was introduced.

Does not your Lordship conceive, that if under those Acts two-thirds of the income were taken from the landed proprietor, it must depreciate the dignity of the aristocracy of Scotland?—Certainly the loss of two-thirds of a man's estate must of course diminish all that influence which depends on wealth, whether by a trust or by any other means. However objectionable the institution of that trust may be, I consider it to have been advantageous, in connection with the operation of those two Acts.

Allowing full force to the argument in favour of the system of Scotch Entails, namely, as it preserves the connection between the landed property and the titles, does not your Lordship conceive that that advantage is greatly counterbalanced by the embarrassments which that system of law creates?—I have already assented to this opinion.

Does your Lordship imagine that it is possible, by any partial remedies, to meet those difficulties, so as to render the system of advantage to the country, without a change of principle?—I am not certain if that might not be the case; it will depend on what the amount of difficulty may be found to be, when it is attempted to make a general alteration of the law. I cannot help feeling, that difficulties in the execution of any such general change will arise, to a greater extent than is foreseen here, where we only look at the general principle on which such a measure may rest; but in the execution of it, I cannot help feeling that there will be many difficulties found. On the other hand, I think that a variety of partial measures may be introduced, by which the present system may at least be ameliorated, if not thoroughly made perfect.

If such partial measure were to be adopted, would you include a power of sale as part of it?—If it could be properly guarded and regulated, I do not think there would be any objection to the adoption of the power of sale; but there again, it would be extremely difficult so to regulate it as to make it quite unobjectionable.

Has it ever occurred to your Lordship, that it would be right to apply a partial power of mortgage, without giving the power of sale?—No; I have always thought that, under some regulations or other, a partial power of sale would probably be necessary.

Has your Lordship, with reference to the conflicting difficulties and evils, come to a conclusive opinion, whether a universal change in principle, or a partial attempt at amelioration, is the course most expedient now to adopt?—I scarcely feel qualified to express a very decided opinion on that subject. I see that the present system is one labouring under great evils, and I see great difficulties in whatever way a thorough amendment of it is attempted. With respect to partial measures, at least as far as they go, they may amend the present system; with respect to a general

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a general change, we must first see what it is, and how it operates, before we can form a decided opinion upon it.

Supposing such a system to be established, and that its operation as to existing Entails should not be made to commence till the extinction of all substitute heirs now in life; do you think it would be expedient to introduce any modification of those subsisting Acts?—I should suppose it would. I think that system would require some modification of these Acts, even before the expiration of term alluded to.

Does your Lordship see any objection to admitting the principle of sale, in any alteration of the law of Entail in Scotland, as a part of the intention of the law, for the purposes of its remedy?—That will always depend upon how it is guarded and regulated. One must first see how it is proposed to confer that power, and how it is proposed to limit it, before one can form a decided opinion.

Provided it were found practicable, would not your Lordship think that any method of relieving entailed estates otherwise than by giving an express power of sale, would be preferable?—It clearly would be preferable, if it were possible, to relieve the estate and at the same time to keep it; but considering the difficulties in which those proprietors are placed, I do not see how it would be practicable; for as money could only be obtained in Scotland upon heritable security, it would be necessary to give that power, to a certain extent.

Your Lordship has stated, that supposing the principle of the law of Entail were to remain as it now is, you do not see any objection to a partial facility being afforded to the extent of allowing part of the property to be sold; although that might give present relief prospectively, would not the heirs of Entail remaining under Entail, become under the same state of embarrassment which requires the present sale of land, and therefore called for, for future sales, the law remaining the same?—That might be very possible; but at the same time, I should hope that estates might sometimes be augmented as well as diminished; and that in the course of years there would be found those possessed of estates who would wish to buy, as well as those who would wish to sell.

Would it not be fair, if the power of rendering fee-simple a part of the property in order to discharge incumbrances which were given, that the power of creating for their future incumbrances should be removed, so as to retain the estate to each successive heir unencumbered and free?—That is a great desideratum unquestionably.

Since the political power of the aristocracy and gentry in Scotland is founded on the superiorities attached to their estate, and since the law has recognized that, by exempting the superiorities from the rigid operation of the statute of 1685; in any new Act extending the English system of Entails to Scotland, would it be in your Lordship's opinion, expedient to exempt the superiorities from the rigid operation of the English system?—I think it would; but this is one of those numerous difficulties to which I have alluded, and which arise when you come to apply a system of law, so different in all its parts from that which exists in Scotland.

Would not such a change materially affect the political state of counties?—I suppose it would.

Might it not greatly facilitate the general object, if the retrospective measure were reserved for the present, and an Act were passed merely for the relief of the inconveniences experienced under the operation of the two Acts now in existence, and for the alteration of the prospective law of Entail in Scotland?—No; I am decidedly of opinion, that no general measure could be justified which did not embrace the present Entails.

Will your Lordship explain your reasons for that opinion?—I have before stated that the only justification for so violent an interference with established law is, the extent of the evil existing under its operation; and I think the legislature could never consign to the endurance of that evil nearly the half of Scotland, which is supposed to be the extent under Entail, while it considers the principle of the law to be so unjust and impolitic as to call for this intervention.

Sir *James Wellwood Moncrieff*, Bart. Dean of Faculty; further Examined.

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HAVE you perused a printed Bill, intituled, A Bill to alter and amend the Law concerning Entails in Scotland?—I have read it over with considerable care.

Will you be so obliging as to favour the Committee with any observations that occur to you upon the provisions of this bill?—I should like in the first place, to observe, that however clear my opinion is, as to the expediency of some very great and serious change in the law of Entails, I am very sensible of the difficulty and delicacy of the question as to the best mode of accomplishing the object; and indeed I am convinced, that it will require a great deal of consideration before the measure can be brought into such a mature and perfect state, as to give a reasonable certainty that the thing is done in a clear and in a safe manner. Having made that observation, I have no difficulty in expressing an opinion, that the design of the bill as now drawn, appears to me to be good in principle, excepting only in one point of it; and as I have considerable difficulty as to that point, which seems to be a good deal involved in the principle of the bill as it now stands, I think it will be proper to take notice of it, in the first place. What I allude to, is brought out particularly in the two clauses upon the third page, which are marked 10, 15, 20, 25. The principle of a Scotch Entail assumes, that the person who is in possession of the estate for the time, is proprietor of the estate by his own right as fiar, and is not a mere tenant for a life interest who has no powers but those of a life renter, unless they be specially conferred. The consequence of this fundamental principle in the law of Scotland is, that as the law of Entail stands at this moment, the heir in possession may do every thing which any other proprietor could do, except in so far as he is expressly restrained by the words of the Entail. Unless there be a general prohibition which covers certain acts; clauses of permission or clauses giving special powers are totally unnecessary, for the heir in possession has the powers of a proprietor if they are not taken away by the deed. Now, so far as I understand the principle of an English Entail, it is the opposite of this; the heir in possession is a mere tenant for a life interest, and there are separate vested estates in the remainder men; and speaking always with that distrust with which one must speak upon a subject which he does not profess to understand, I believe that the consequence of this in the law of England is, that the heir of Entail as tenant for life has no powers over the property, except those powers which are expressly conferred upon him by the deed of Entail. I believe I said, in my former examination, that so far as I understood the state of the law of England and the effect of it, it might be a safe measure to reduce the power of making Entails in Scotland, to the same degree with the power as it exists in England. But in making that statement, I certainly did not intend to say that in my opinion, it would be altogether safe just to take the law of England *per aversionem*; or to speak particularly to the point which I am now considering, I did not intend certainly to say that in my opinion, it would be right so to *invert* the principle of the heir's right in a real estate under a Scotch Entail, as to change him from a proprietor or fiar, into a mere life-renter. It does not appear to me that it is necessary to do this, in order to obtain the beneficial limitation of the power of making Entails in the way contemplated; and unless it be necessary in the opinion of the Committee, I certainly think that it would not be a safe measure; because it would produce a total change in the *principle* by which real property is held in Scotland, and would inevitably lead to a great many questions, which though they may be well settled under the matured system of the law of England, would involve Scotch conveyances and Scotch courts in very serious perplexities, in applying them to the forms and principles of the law as to real property in Scotland. The two clauses to which I allude, are evidently framed on the principle of an Entail made out and out according to the law of England; for the first of them, instead of providing that the heir in possession shall enjoy all the powers of a proprietor, in so far as he is not expressly prohibited, or leaving this to the operation of the law, provides that he shall not only have no power to do the particular things which are enumerated, unless they are expressly permitted; but that he shall not have power "to do or permit to be done *any other thing whatsoever*," except in the specific manner and to the extent to which he is expressly permitted to do them by the Entail: And the clause which follows, brings out this principle still more clearly; because it provides that *no powers* or *faculties* shall be valid, and that no *burthens* charged on the estate shall be *effectual*, unless the

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tailzie be registered *in terms of the Act* 1685. This last provision would certainly be thought a little extraordinary in Scotland. The registration of the Act of 1685. was a registration required as indispensable to the efficacy of the *Entail*, to prevent the exercise of powers and to prevent the imposition of burthens. It was a registration for the protection of creditors and purchasers *against the Entail*; but the registration here proposed, is a registration to prevent the *exercise* of *powers* actually given, and to prevent the validity of burthens even though expressly permitted to be imposed by the Entail; and yet the registration is said to be in the manner directed by the Act of 1685. The Committee will easily see that my observations upon this, are all dependent on the change of principle which I have endeavoured to point out. If the observations which I have made on that point, do not meet the views of the Committee, and if they are of opinion that that complete change of principle is indispensable to the rest of the design brought out in the bill, then what I have said as to my own opinion of the effect of such a change, will of course be laid aside. But I think it is right further to observe, that if the Committee should come to that opinion, I should humbly take the liberty of recommending that the point should be brought out specifically in an early part of the bill, so as to leave no doubt whatever as to the true meaning in these particular enactments; for, as the bill stands at present, these things are introduced only incidentally, and might be thought to proceed, not upon an intention to change the principle of a Scotch Entail, but on a misunderstanding as to what the principle of a Scotch Entail is. That is the principal observation I have to make upon the general design of the bill, as it stands.

On the supposition, that the object is to preserve the property entire, does it appear to you necessary that that provision should form part of the bill?—It certainly does not appear to me to be at all necessary.

With regard to what you have now stated, supposing the first of the two clauses to be omitted, and the second to be modified, should you think that the design of the bill would then be such as to be entitled to general approbation?—I think so upon the whole; but perhaps I should add, partly in answer to the previous question, that it appears to me that it would be very expedient, in a bill of this sort, that there were somewhere contained in it, either at the beginning or in some other part of it, something like a definition of what should be considered a good and valid Entail. If that were done, then it would be quite clear and beyond dispute, that every Entail that was made according to that definition would be a good and valid Entail, and would be effectual to prohibit all the general kinds of acts which are commonly comprehended in the clauses of an Entail as they now stand; and if the form of making such an Entail were simplified in this way, I think that very few cases would occur of a person making an Entail, by the hands of an experienced conveyancer, where any material difficulty could arise as to whether it was effectual in its nature or not; and then, if it were held effectual generally against the ordinary acts of selling the estate, of altering the succession, and of contracting debts or burthening the estate, whatever other special prohibitions might be inserted into it, all acts which were comprehended in those general descriptions would stand prohibited, except in so far as specific powers excepted from the clauses were inserted; and in that way the same object of certainty would be attained, which I apprehend is the object of the change of principle here contemplated.

Under the existing law of Entail in Scotland, may not the fiar, or as he would be termed in England the life-renter, commit every species of waste on the property which the deed of Entail itself does not prohibit?—We certainly, when I was learning the law, and for some time after, were accustomed to hold that doctrine. I am not quite sure whether we can say so now. As an instance, I may mention that it was generally understood when I came to the bar, and was apparently held quite certain, that an heir of Entail in possession might cut any trees upon the estate that he thought proper, whether they were ornamental or not. That stood upon one ruled case of the Countess of Oxenford, where the heir in possession proposed to cut the whole of the ornamental trees about the mansion-house; the next substitute heir objected to that, and had gone so far as to say, If you will leave the trees and have them valued, I will pay the value of them myself rather than that they should be cut down; and notwithstanding this, the court held, that the heir in possession, being fiar, had power to cut the trees. The court have since gone some way, though not yet very decidedly, to hold, that in the case of ornamental timber, the heir in possession has not power to cut it.

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May not the heir in possession let old grass land be broken up, without any condition of management whatever?—Certainly, so far as my opinion goes.

Inasmuch as the absence of all such conditions of management will increase the rent during the time that such exhaustion is going on, is it not, under the law of Scotland, the interest of the heir in possession so to exhaust the property?—In many instances it is his interest to make the most of the property during his own life, as the law of Entail stands at present.

Is not the tendency of such a state of affairs to lead to a progressive exhaustion of the entailed estates in Scotland?—It must have such a tendency; and I suppose that is one of the causes why entailed estates are not in the same condition with other estates generally.

Is it not infinitely more simple to say, that nothing shall be done that is not in terms permitted, than to say that every thing shall be done that is not in terms prohibited; inasmuch as a negative is always much more difficult to prove than an affirmative?—It may be thought more simple in some views; it certainly is more simple, if the object be to prevent the person who is in possession from exercising the powers of an ordinary proprietor; but if the law of Entail be reduced into the more limited state which is contemplated, I think there would be much greater evil in obtaining that simplicity, by a total change of the principle of the law, than there would be in the dangers, difficulties, and disputes which would arise in consequence of that change.

You were understood to state, in the former part of your evidence, that what you term a strict construction has been put upon deeds of Entail, in the courts of Scotland; and that in the appellate jurisdiction of the House of Lords, a construction, not founded on the same principle, has there been put upon them?—I am not authorized to state that, and I believe I did not state it; because it was uniformly declared in the House of Lords, that there was no intention to proceed against the principle of strict construction, but that it was after giving that construction that their Lordships came to the conclusion in the particular cases. But I believe what I have said is, that the *effect* has been to produce an impression that such change was made.

Does not that construction in the House of Lords mainly proceed from the practice arising out of the state of the law of Entail in England?—Assuming that there has been any departure from the principle, I certainly should suppose that that must have been a good deal produced by the impressions which a Judge, who has been educated all his life in the study of the English law, finds it difficult altogether to throw out of his mind; and I believe that the noble and learned persons, who have advised the House of Lords in these matters, have often declared that they felt the difficulty of throwing such impressions out of their minds, however desirous they were of doing so.

Inasmuch as the last appeal in cases of Scotch Entail is vested in the House of Lords, over which an English lawyer presides, would there not be very great advantage in assimilating the law of Entail in Scotland to the English law of Entail, since the construction that will be put upon the Scotch Entail is likely to be an English construction?—There is no doubt whatever, that if the law of Scotland in these points, or in any other points, were precisely assimilated to the law of England, the Judges who have to consider those cases in the House of Lords would have more certainty in pronouncing the judgments which they make; but in that case it would be essentially necessary that the Judges in the Scotch courts should, in the first instance, study the law of England.

If the period is now arrived at which the defects of the law of Entail in Scotland are so apparent as to demand legislative interference, and if that legislative interference were to be of the nature of an extension to Scotland of a portion at least of the law of Entail in England, do you not see evil in extending it piecemeal, and not entire, as the experience of its benefits can only result from a knowledge of it in its perfect state, as it exists in this country?—I must own that I do not see any difficulty in that, because I think the separation is very simple; that you may take the principle of the law of England in so far as it limits the extent to which the Entail may be made, without at all taking along with it the principle, that the heir in possession shall have a mere life-interest.

If the tendency of the law of Scotland be, to produce a progressive exhaustion of the estate, while held under Entail, and the tendency of the law of England is to preserve the estate, while under Entail, exempt from all such exhaustion; would not the danger of sales be greatly increased, whenever the Entail should terminate, provided

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provided the exhaustion were great, and the difficulties consequent upon the exhaustion augmented?—In order to answer that, I must make this observation; that I am not at all prepared to say, that if the change that is contemplated in the state of the law of Entail in Scotland were to be made, without taking that principle of the law of England, the tendency of the law, as it would then stand, would be to produce that exhaustion; because the powers which would then be given to heirs successively in possession would entirely change their interest in the management of the estate; and besides, I am not prepared to say, if those alterations were to be made in the law of Entail in Scotland, and most particularly if the resolutive clause were to be taken away, that then there would be the same grounds for the strict construction which has been applied hitherto to the restraints laid on the powers of heirs of Entail.

If that exhaustion of the estate took place, which you think probable, thereby leading to increased frequency of sale, would not the great advantage which practically is experienced under the law of Entail in England, namely, that by the estate being preserved entire during the Entail, at the expiration of it, it is not sold, be put in great jeopardy in Scotland?—I should think that that is a question that must be answered by those who have experience of the practical operation of the law of England. I am not prepared to say what would be the precise effect of it, divested of that quality.

Upon the assumption that exhaustion would take place, and a tendency to sale be thereby created, would not a sale take place, upon a power of sale being given?—If it be assumed, first, that the exhaustion would take place under the state of the law as so modelled, and secondly, that if any part of the land were exhausted, that would lead to more frequent sales, certainly the conclusion must be arrived at, that there would be more danger of frequent sales under that system than under the system of the law of England.

Do you doubt those premises?—I do; I only know that, as the law stands at present in strict Entails, there is in many instances an interest in the heir of Entail to make the most of the estate in his own time, whatever may become of his successor; but what would be the effect as to raising such an interest, if the new system proposed were introduced, it is quite impossible for me exactly to say.

If those clauses were struck out and the Entail were limited only in point of time without any limitation of power, would not all the tendency to exhaustion exist precisely as it now does?—There would in my opinion be a power to cultivate the lands according to a man's discretion, except in so far as it was expressly prohibited in the Entail made; but the existence of the power does not necessarily imply that the thing would be done.

Is it not the interest of the heir in possession so to exhaust the estate?—It would be the interest of the heir of Entail in most cases not to do it; cases might occur in which it would be his interest to do it, but I think they would be very rare.

Practically at the present moment under existing Entails, is it not the practice of the heir to exhaust his estate altogether?—As the law stands at present, undoubtedly it occurs in many cases that it is his interest to use the land to the utmost for his own benefit.

Then if the limitation in point of time remained, and no limitation in respect of power were introduced into this bill, would not the probability of that practice being pursued remain unaltered?—The power that would be given by this change of the law would so completely change the interest of any heir in possession, that one cannot, without knowing the special circumstances of every case, say what would be his interest in that point.

What makes you think that there would be a change in the power of the heir in possession?—There would always be a power to cut down the Entail and to make a new Entail. In every new Entail to be made, there would be that power with the concurrence of a substitute unborn at the date of it.

You conceive that in every new Entail there would be new powers suited to the circumstances of the time and of the estate inserted in the Entail?—I should think so; but independently of such specific powers, if a man were in possession of an entailed estate, under the new system, though he could not alter it at the first moment, he would know perfectly well that if he should have a son who was unborn at the date of the Entail being made, he can, with his consent, regulate the estate as he may think proper; and therefore looking at the interest of his family generally, it would not in general be his interest to run out the land, but on the contrary it would be his interest to save it.

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Do you find, practically speaking, at the present moment that heirs in possession deteriorate their property much?—I think it happens very often that at least they do not cultivate and preserve it with the same care that a man who has the entire command of the estate would do.

Does not the reverse very often happen, that they do preserve their estates?—The reverse often happens when the heir in possession has his family and his affairs so situated that he conceives it best for the interest of himself and his family to cultivate the land as if it were fee-simple.

What is the real difference between a life rent estate, according to the law of Scotland and the interest which a substitute heir of Entail has when in possession of an entailed estate?—The legal distinction is, that a life renter not being proprietor of the estate, has no power or rights except those which properly belong to his own life interest, and which are defined by law, independently of the terms of any deed; for example, a life renter can make no lease to subsist beyond his own lifetime: I am speaking of a fee-simple estate: a life renter cannot burthen the estate with debt; he cannot dispose of an inch of it; the fee of the estate cannot be attached, as in his person nothing but his life interest can be touched. The case of an heir of Entail in possession is diametrically opposite to this; he has all the powers of a proprietor which are not expressly taken away by the Entail; he can make leases beyond his life, which will be effectual against the next heir who succeeds, if they are not such as the Entail, either by express words or by words which are held to be express, has prohibited, and so he has in him the legal *title* to make an effectual burthen on the fee of the estate and to make an effectual conveyance of the estate; and these things are prevented not by *defect* of *title* in the proprietor, but by the *qualities* of the *title*, consisting in the prohibitions and clauses irritant and resolutive which it contains, protected by the statute of 1685.

Supposing a person making an Entail in Scotland, how many life rent interests might he limit in his deed; and can any person be made a life renter except a person in being at the time?—Undoubtedly a person may convey to *A. B.* in life rent whom failing to *C. D.* in life rent.

Might *C. D.* be a person not born?—I do not see any thing to prevent this.

Then you may limit one life rent estate after another?—I think so; but this must be observed, that you must put the fee somewhere.

Supposing there is a reversion of the fee in himself?—That would put it in himself at first, and afterwards in his own heir; if you convey simply to *A. B.* in life rent, whom failing to *C. D.* in life rent, whom failing to the grantor and his heirs and assignees, the fee would remain in the grantor; and if he died the fee would according to the specialties of the case, either be in the first or in the second life renter, or it would be in the heir of the grantor; for it is a principle in the law of Scotland that the fee of an estate cannot be *in pendenti*; it must be somewhere, and there is a great class of cases, in which what probably would be thought to be a mere life rent in England is a constructive fee; for instance, if a man conveys an estate to himself in life rent and to the heirs of his body, or to the heirs of a particular marriage, in fee, with no other words, the fee remains in himself; and this even although it should be by onerous contract. But I abstain from going into the technical distinctions, which are very nice upon that subject.

If therefore you intend to convey to a life-renter, powers necessary to administer the estate, will it not be necessary to do it by means of permission in the way intended by the clause in this Act?—Certainly; except in so far as by the nature of life-rent, by the law of Scotland the powers follow of course from that right.

It being a principle of the Entail law of England, that property is held while under Entail with impeachment of waste, and this bill professing to extend to Scotland the law of Entail in England; if by this bill, property under Entail in Scotland were to be held without impeachment of waste, in point of fact, would not the law of Entail in Scotland so altered, be less stringent than the law of Entail in England?—It would. But it appears to me that if it be thought desirable to prevent the commission of waste (which however is a term which I do not pretend to know the whole scope of) it were better that this should be provided expressly, or that it should be declared, that an Entail being made according to the principle of this bill, it shall not be competent for any heir to do those things unless they are permitted, than to introduce the clause upon the assumption of a principle without explanation.

Though professedly by this bill the law of Entail in England were transferred to Scotland, you are prepared to admit, that without those clauses it would not be an entire transfer?—Certainly it would not.

But you think it would be an efficient transfer for useful purposes?—I think so.

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At the same time the law of Scotland, though professedly founded upon the law of England, would be less stringent?—It would, unless you introduced some prohibition of this kind, that with regard to those particular things, it should not be lawful for the party to do those things without an express permission.

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You have stated, that until an Entail is recorded according to the provisions of the Act of 1685, the lands entailed are subject to the debts of the heir of Entail in possession?—Yes.

And you are of opinion that that provision in the Act of 1685, was for the benefit of creditors?—Yes.

Supposing the law was understood to be, that no charge upon an estate was effectual until the Entail was registered, would not every creditor be careful then not to lend his money till he saw the register of the Entail?—Every creditor who understood that state of the law, would be desirous of seeing the deed before he transacted.

With reference to the last clause in the bill with respect to registration, admitting that the principle upon which the registration should hereafter take place, would be the inverse of that upon which it now takes place; in your opinion, does that clause profess to do any thing more than to provide a machinery of registration according to the statute of 1685, without any reference to the principle upon which that registration takes place?—Certainly; the mere act of registration would be the same, whatever the principle of it was; but it is to be observed, that if that clause were taken as it stands, with the inversion of the principle, it would be difficult to say that it did not necessarily follow from it, that the Entail itself would be good against creditors, though not recorded.

Is it not generally notorious, from the present system of entailing in Scotland, whether the Entail of an estate is recorded or not?—In general it is perfectly well known; but there are instances where Entails are recorded, in which, notwithstanding that state of the title, the party does get credit to a very large extent.

Do you consider that tradesmen in general are aware whether an estate has a recorded Entail upon it, or not?—Tradesmen of any extent, when they come to give large credit, must be supposed to enquire into the nature of the rights of the party with whom they deal; it may be seen for a few shillings.

Do you not consider that this clause, by which Entails must be registered in order to render burthens effectual, is quite contrary to the present law under which a creditor lends money?—I think that certainly it is; because at present, if the Entail is not recorded, it is no matter what prohibitions it contains, and no matter what the powers may be that are expressly conferred; if it is not recorded, a creditor has nothing to do with it, and is not bound by it.

Do you consider that this would be an improvement in the law, or otherwise?—I have already said, that I do not think that that change of principle is essential to the object of the bill, or to the safety of the measure.

If any danger should be apprehended from the extension imperfectly of the law of Entail in England to Scotland, with a view to the maintenance of the aristocracy of that country, and to the prevention of the too frequent recurrence of sales on the whole; would you say, that those clauses transferring the law of England entire, were preferable to the maintenance of the existing law of Entail in Scotland?—It might be difficult for some persons to decide between those two alternatives; it depends on their opinion as to the extent of the evil attending the present system: my impression upon that subject is so strong, that if it were thought that that change of principle were indispensable to the measure contemplated, I would rather take it with that which I thought an imperfection and an evil, than not have it at all.

Do you think it indispensible?—I do not think it indispensible; I think that all the objects contemplated by it, if they require express provision, may be accomplished by such clauses as are thought necessary, without going so far.

Supposing the change of principle, implied in the first of those clauses, were abandoned, should you recommend the introduction of a clause, controlling the heirs in possession as to certain enumerated subjects?—I see no material evil in that; but of course it would depend upon the specific things that were enacted.

Under the change in the structure of the law, which this bill would effect, do not you think it would be necessary to supply the place of this clause, if it were withdrawn, by some such restriction?—I think that probably it might be useful; but

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but I do not myself contemplate, with any seriousness, the dangers of abuse, which seem to have led to the notion of the necessity of those prohibitions.

If no such restriction were introduced, would there not, in many instances, be a very good security for no waste taking place, by the introduction of the English system in this respect, that the only facility that can be obtained must be got by the heir in possession, having the concurrence of the substitute, to dock the Entail; and that with a view to obtain that concurrence, it is not likely that he would incur waste beforehand?—I think that that consideration must have a considerable operation whenever the system is established, and that it would have a considerable influence, even if there were an express power to do those things inserted in the Entail.

You are aware, that if the concurrence of the next substitute could not be obtained, the Entail would die a natural death under the proposed alteration, after the lapse of a certain period, and the falling in of certain lives?—It would die a natural death after a certain time; but probably not in the life-time of the person that we are contemplating at present.

Supposing the next substitute heir to refuse his consent to barring the Entail, might not the heir in possession threaten to commit waste upon the estate, in order to induce him to give his consent?—It is impossible to deny that such arguments might be used.

Should you, upon the whole, recommend that those two clauses should be omitted, leaving the law of Scotland to operate as it has hitherto been supposed to be established, modified as it would be by this bill, respecting the power of leasing, granting feus, and making escambions?—My own opinion is, that it would be perfectly safe so to leave it; but if it shall be the opinion of the Committee, or of Parliament, that some express restraint should be imposed on that subject, that can be done by a separate clause.

Would not that which you recommend, be, upon the whole, a greater relaxation of the law of Entail than is contemplated by this bill, as it now stands?—Undoubtedly, on the supposition that these clauses do in fact increase the strictness; because you take out the clauses that make the restraint; but if the Act were successfully framed for *all* its objects, there would, in few instances, be any material practical difference.

Is not the term *alienate* of very broad import?—Under the law at all times, and still more under the late decisions, it is of very broad import.

How far do you think it would cover most of the specific things contained in this clause?—It certainly would cover the granting of *feus*, whether for building or for any other purpose, because a feu is and always was an alienation. It undoubtedly would cover the letting leases beyond the term of twenty-one years, if that be taken as the longest term admissible under the recent decisions of the House of Lords. It would cover the making exchanges of lands. As to the power of cutting ornamental timber, I have already said that it is a point somewhat in doubt at this moment, whether a prohibition to alienate is effective to prevent the cutting of ornamental timber or not. Further either that term, or the prohibition to contract debt, certainly would cover the granting of jointures to widows, to be secured upon the estate, because that only can be done by conveyance of a part of the estate to a certain effect. It would also cover the granting of portions to younger children, if they were to be secured on the estate. The word *alienate*, according to the present law, would not cover *the contracting of debts* in strict construction; but then the ordinary prohibition *against contracting debts*, which of course would be required in every good Entail, would be effective to that purpose; and perhaps under the prohibition to contract debts, might, in the case of marriage contracts at least, more properly be included the case of jointure for a widow and portions for younger children, as burthens created upon the estate. But one or the other would cover all those things; and it is for this reason that I have particularly pointed my observation, in the first instance, to the general words, which stand thus, "Or do or permit to be done *any other thing whatsoever*."

Supposing that was to be followed up by these words, "By which the same may be burthened, charged or alienated?"—According to the present construction of Entail, those words would be considered as mere surplusage.

Is there not an uncertainty at this moment in the law of Scotland upon the point of leasing; it having been decided in the court of Session that a lease for thirty-one years is an alienation; and it having been decided in the House of Lords, that a lease

lease for twenty-one years is not an alienation; is not there a doubtful period between twenty-one years and thirty-one years, upon which it is a question whether such a lease is an alienation or not?—I believe I ought to have qualified my answer, by saying that it does remain not positively decided whether a lease granted for a period between those two would be valid or not; but in general it is supposed that twenty-one years is the limit.

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Then you think that the general terms of alienating and not contracting debt, explained by stating, that cutting ornamental timber and letting leases of a certain length were acts of alienation, would answer the purpose?—I think so; it would be a very easy matter in any statute that was passed, to declare what length of lease should be an alienation.

Will you have the kindness to favour the Committee with any observations that occur to you, upon any of the subsequent clauses of this bill?—At the top of the eighth page, at figure 5, there is a clause which relates to the power of granting feus for building, it declares, "Provided that no more than one-fourth part of an imperial acre shall be granted to any one person either in his own name or in trust for him." There was an abuse under the Act of 10th George 3, which provided that no more than a certain portion should be given in lease to any one person *at one time*, which was thought to leave it open to a person to grant one feu to-day, and another feu perhaps a few days after, or in order to make it more decided, a month hence or six months hence; and in that way I have known some instances of very considerable extent of ground being granted to one person by such separate leases. I imagine that the clause put into this bill is intended to avoid that difficulty; but it may be questionable whether in avoiding that difficulty, it does not go too far the other way. It certainly is somewhat difficult to steer between them; but it seems rather strong to say, that no more than one-fourth of an acre shall ever be granted to any one person; because you can suppose a case of a man making a feu of one-fourth of an acre, and a great many years afterwards wanting to make another to the same person, which might be very beneficial to the estate; and it would be very hard to have a statute which might render that impossible.

You are aware that that is limited to existing Entails?—I am aware of that.

Will you suggest such modification of that provision, as you would approve?—I have not made up my mind upon that; but I thought it right to point out the difficulty.

Have you looked at the next clause of the bill, at page 8, commencing line 8?—I have. I have one observation to make upon the part of the clause contained in page 9; I think that the principle of that clause is perfectly right and just; but this depends on one consideration, which I should humbly suggest ought to be expressed in some way. It is quite reasonable that the heir of tailzie in possession, who has laid out his money upon the improvement of the estate, should have the relief contemplated; and it seems to be equally reasonable that where his immediate predecessor has laid out money upon the estate beneficially, the heir in possession should have relief of that also, *provided that he has represented universally that predecessor*, or *has taken upon himself the obligations created by the expenditure on those improvements*; and perhaps it might go beyond the immediate predecessor, if you take that quality along with it. But if we figure a case, that the immediate predecessor has laid out money upon the estate, and that the person who represents him in the obligations for that money, or who loses the money from his personal or separate funds, is *not* the heir in possession of the estate, it would be very unreasonable in that case, that you should give the relief to the heir in possession, who gets all the benefit of the improvements, and does not take the obligations; so that I think, something must be introduced there to qualify it in that manner.

Is there any thing else which occurs to you, with respect to any of the clauses of the bill?—It must strike any person in reading this bill, that while the existing heirs of Entail will get the benefits that are conferred by it, in so far as it may apply to their case, they will be deprived of the powers which they possess under the Act of the 5th George 4, of making provisions for their widows and children at the expense of the future heirs.

Though those powers were given by the legislature, are they not enjoyed in contravention of the disposition of the original entailer?—There can be no question that the powers conferred by that statute did so far set aside the provisions of the various Entails that may be inconsistent with them.

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Supposing the case of a party in possession of an entailed estate applying under the clause in page 8, with a view to relieve himself, were to die before the application were completed, would it be reasonable and just that it should be in the power of the party applying at the same time, to assign in any way that application, so that it might be rendered complete for the benefit of creditors, in the event of his death before the operation was completed before the court, and relief afforded; in short, to give a power to assignees to follow out the application commenced?—I understand that question to relate to the provisions enabling heirs of Entail to apply to the court, in order to obtain relief of debts created by previous improvements; and I should think that it would be reasonable, that if the application be truly and *bonâ fide* made to the court, in the lifetime of the heir in possession, the benefit of the application should not be lost, although he should die before the proceeding could be completed.

Do you think that a general power should be taken under this Act, to pay the entailer's debts, which power is always obtained under special Acts of Parliament, when applied for upon this principle, that in truth the estate can only be said to be an entailed estate when it shall have paid the entailer's debt, and the remainder be considered as entailed property?—I should think it would be quite reasonable, and would save a great deal of expense, and of course save the interest of the heirs of entail, that where it is clearly ascertained that there are entailer's debts that affect the estate to such an extent as to render a sale of part of it necessary, the heir should have power to make a sale at once, instead of going to Parliament for an express power; but as I believe Parliament is very strict in requiring evidence of the existence of the debts, and the amount of them, I should think that there must be a form established, by which a like strictness should be observed by the court of Session, before the heir proceeded to make a sale.

By the provisions of this bill, in the case of an heir breaking the Entail, do his debts affect the estate as if he was the first entailer?—In so far as the Act gives power to the heir in possession to break the tailzie, for the purpose of making another Entail, the clause on the fourth page has the effect that the debts of that heir will not affect the estate as if he were himself the entailer; but, as I understand, in so far as the bill gives power to an heir, under certain circumstances, to convert the estate into a fee-simple, it seems to have the effect, that after all the previously existing burthens are defrayed, the debts of that heir will affect the estate.

In cases of debts being chargeable upon entailed estates, previously to being recorded, would there be any objection to giving a power, in a general measure of this sort, that such debts should be discharged, so as to avoid the necessity of individual applications for special Acts of Parliament?—I think it would be an advantage to give the power; but in such cases, and indeed in general, as I believe I observed formerly, I think it would be necessary, by this proposed Act of Parliament, in some way to settle this question, that if the Entail, from defect of form, be not effectual against debts or against burthens, no claims shall lie at the instance of substitute heirs of Entail against the heir in possession; for otherwise, though you give a power to sell for the payment of those debts, in consequence of the Entail not being recorded, you must leave the question open, whether the substitute heirs have not a claim of damages against the heir in possession; and perhaps there may be difficulty in that, in so far as it might have any retrospect to existing circumstances.

You stated that it would be advisable that the Act should provide for the payment of the entailer's debts without going to Parliament; did that answer apply to the heir in possession?—Yes.

You are aware that by this Act a new Entail is to be made, not merely by the heir of tailzie in possession, but by the heir of tailzie in possession in conjunction with the substitute heir; how does that provision apply with respect to the debts of the subsequent heir?—As I understand the principle by which power is to be given to the heir in possession in conjunction with the next substitute to make a new Entail, when that new Entail shall be made and rendered effectual according to all the provisions of this Act, the debts neither of the one nor of the other will affect the estate; and on the other hand, by the clause in the fourth page, until the Entail be completed and recorded the old Entail will subsist and be effectual.

Then in point of fact there is no interval during which the estate is unentailed?—No interval as the bill stands now.

Does that clause in page 10, for calling substitute heirs, appear to you to be the best provision for ascertaining the substitute heirs in existence?—I must confess that

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that I have not particularly considered that clause, and there may be some difficulties in it from the circumstance of persons being abroad, or in the colonies, the East Indies and elsewhere, who are heirs under some of the branches of the Entail, and who may have families and children born successively, so that it may be very difficult to know who are all the substitutes of any Entail; and besides some Entails contain such extensive destinations. I remember the Entail of Seaforth contains a very extensive one, which indeed ends in the heir male general of a person that died about ten centuries ago. I understand the clause to be for the purpose of ascertaining who were the substitutes at a fixed date, and that being the object, I think it is quite reasonable that the burthen of entering their names upon the record should be thrown upon the substitutes themselves, allowing them forty years to do it in.

Is not forty years the usual time for prescription in Scotland?—It is.

Having favoured the Committee with your observations upon some of the specific provisions in this bill, is it upon the whole your opinion that the bill, keeping in view such observations as you have made upon it, is deserving of the consideration of the Committee and of Parliament?—I have no doubt whatever that it is, subject to the observations which I have made as to some part of the principle and some of the particulars in the bill.

Do you consider it a measure calculated to confer a benefit by an alteration of the existing system of Entail law?—I think it is; but as I said in the beginning of this day's examination, I am quite sensible that to accomplish the thing in the best manner, the particular provisions may require a good deal more consideration perhaps than has ever yet been given to them.

But still you are of opinion that those difficulties ought to be contended with, and that they ought not to be considered as of that serious character that they ought to discourage the Committee in prosecuting this important subject?—I certainly think that they are not of so formidable or insuperable a nature as that the Committee should be in the least discouraged in proceeding with the object, if they are of opinion that this object ought to be prosecuted.

After this bill is brought to its most perfect state in this Committee, are you of opinion that it would be desirable that it should lie over for some time to obtain the opinion of the public in Scotland upon it?—I rather think it would be so.

Would you see no danger from such delay, arising from the rapid multiplication of Entails and from the extensive operation into which Lord Aberdeen's Act would immediately be brought?—I think there is some danger of these things taking place.

Does it occur to you, whether a prospective measure might not be tried in the first instance?—A prospective measure would prevent one of the things contemplated in the previous question; it would prevent a rush to the record of tailzies, to make tailzies upon the old principle.

Does it occur to you that there would be any strong objection in the country, on the part of any individuals, to a prospective measure?—I should not think so.

Would not the great principle that alone could authorize a change of the law, prospectively, involve, of necessity, the justice of some retrospective enactment?—I think it does.

Do you not think that the probable result of making new Entails, which may be produced even by the inquiry which has been instituted, renders the necessity of some powerfully remedial measure, at no distant time, even greater than before this inquiry was commenced?—I have not such information as to enable me to say that there has been any great activity in making Entails, in consequence of this inquiry. I think it is probable enough, but I am not aware of any precise case where there has been haste to do so, on account of the inquiry; but it is very likely that such cases have existed, or may exist.

The present operation of Lord Aberdeen's Act being secret, are there any means of ascertaining the extent to which this inquiry has brought that Act into operation?—No.

What should you think of a measure suspending the Act of 1685, the Improvement Act, and Lord Aberdeen's Act, till the next session of Parliament, allowing this measure to stand over?—I should not myself see any evil in suspending the three Acts; but it would perhaps be considered fully as strong a measure as the bill itself.

Would it not suspend the power, so long as the suspension was in existence, of any Entail proprietor providing either for his wife and children, or the improvement of his estate?—Where there was a perfect Entail under the Act of 1685, without

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power to provide for a wife or children, it would certainly suspend the power of an heir in possession to make such provisions.

If it is contemplated to do away the perpetuity of Entails, would it not be a wise measure to provide that in the first instance, it should pass into the most perfect state of an English Entail, that is, that two parties must be consenting to the sale of the estate?—I understood that in all those points, the Act was intended to make the rule of the law of Scotland the same as the law of England. If the rule of the law of England is, that even after the death of all the persons in existence at the date of the making of the Entail, the last person surviving has not the power of breaking the Entail without the consent of a second person, I should think it was expedient that the same conjunction should be required Scotland.

Do you not think, that where so great an alteration is made of the existing law as that of limiting the series of heirs, the first measure to be taken for the security of the family ought to be to require the consent of two parties?—There may be some reason and expediency in that proposal; but I should humbly think that if the principle were adopted of limiting the Entail to the existing persons, it does not seem to be very consistent with the principle that after all those persons are exhausted, you should still require the consent of others that do not exist.

Might not a considerable series of heirs be cut off by that measure, who now have rights?—No series of heirs would be cut off who now have rights; because persons that are not in existence cannot have rights. It is a mere question of expediency, upon which I do not think it is necessary for me to form a decided opinion.

Would not the necessity of such a concurrence on the part of another non-existing heir, be a mere postponement to another generation of this change, which must at last be made?—It would be a mere postponement of it to the next generation.

APPENDIX.

SIR, Edinburgh, April 8, 1828.

IN compliance with the Order of the Select Committee of the House of Commons on the Scotch Entails, transmitted to me by you on the 18th March, I have directed the Records of the Faculty of Advocates to be carefully examined. And I have now the honour of transmitting to you an Extract, certified by Dr. Irving, the Clerk of the Faculty, of all the Entries found, on the subject referred to.

I have the honour to be, Sir,
Your most obedient Servant,

James W. Moncrieff,
Dean of the Faculty.

Thomas F. Kennedy, Esq.

Edinburgh, 30th June 1764.

THE Dean acquainted the Faculty, that he had taken the liberty to call this Meeting of the Faculty, *pro re nata*, in order to submit to their consideration a matter which appeared to him to be of the greatest importance and general concern to the whole subjects of this part of the United Kingdom; viz. the Law as it now stands in the matter of our Entails, which of late years have been the subject of so much outcry and complaint. That the pernicious consequences arising from these are sensibly felt by all ranks and degrees of persons; and are daily making such progress, if some effectual stop is not put to them, they must soon overwhelm the whole nation, and withdraw the bulk of the lands of Scotland from being the subject of commerce. That he considers this to be a proper object for the consideration of this learned body, not only to deliberate on the proper remedy, if any such can be found, but even to prosecute and follow out the same. In which, if they shall be so fortunate as to succeed, it will not only do a most essential service to the country, but will reflect great honour to themselves; and therefore humbly proposes that a Committee should be named, in order to take this matter under their consideration: and when they shall have concerted what seems proper to be done in this matter, that the same be reported to the Faculty, for their correction; and that, as usual on the like occasions, it be recommended to the Committee to notify this resolution to the Society of Writers to the Signet, and to confer with a Committee to be named by them.

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The Faculty, after reasoning upon the proposal, unanimously signified their approbation of it; and named the Dean and his council, together with Mr. James Erskine, Mr. John Swinton, jun., Mr. John Dalrymple, Mr. William Johnston, Sir Adam Fergusson, Mr. James Fergusson, jun., and Mr. Alexander Murray, as a Committee to take this matter under consideration, and to report their opinion to the Faculty, and to confer thereupon with the Writers to the Signet.

(signed) *Alexander Lockhart*, D. F.

The Dean present. Edinburgh, 28th July 1764.

THE Dean acquainted the Faculty, that the Committee to whom it had been recommended to take the subject of Entails under consideration, and to report their opinion to the Faculty, had drawn up a scroll of an Act for explaining and amending the law respecting Taillies as they now stand in Scotland; and that he was about to lodge the said scroll of the Act, in the Clerk to the Faculty his hands, for the perusal of the members of the Faculty, till Saturday next, at which time they intend to take some farther steps in this affair.

(signed) *Alex^r Lockhart*, D. F.

Edinburgh, 4th August 1764.

THE Dean reported the proceedings of the Committee upon Entails, and their conference with a Committee of the Writers to the Signet, upon that matter.

Then he laid before the Faculty, the heads for an Act of Parliament, as the same had been prepared by their Committee; and the Faculty took the same, clause by clause, under their consideration. Some gentlemen proposing a vote, the question was put, Whether it was expedient to abolish Perpetuities, or not; and it carried in the affirmative by a very great majority, forty-three to four.

It was proposed as an amendment, That heirs of entail should be empowered to sell parts of their entailed estates for paying off debts, which were lawful burthens upon the Entail; and also, that where there was a jointure or life-rent upon the entailed lands, to the extent of a third of the rents, that nevertheless there might be another jointure or life-rent imposed to the extent of a third of the remaining free rent:—which Amendments were agreed to; and the Faculty approved of the heads of the Bill in all other points.

The Faculty recommended to the Dean to cause fair copies to be made out as soon as possible, and that he would be pleased to deliver one to each of the Judges of the court of Session and Exchequer; that thereafter he would be pleased to cause print a sufficient number of copies, and to send so many of them to each Sheriff, desiring them to communicate the same to the residing Noblemen, and to a meeting of the Gentlemen, and to the Provost of Burghs within their several jurisdictions, for their consideration.

(signed) *Alex^r Lockhart*, D. F.

Edinburgh, 11th August 1764.

THE Dean represented to the Faculty, that he had caused copies of the heads of the proposed Bill respecting Taillies in Scotland, to be delivered to the Lords of Session, and Barons of Exchequer, for their approbation, correction and amendment; and that the Lord President of the court of Session had signified to him, that he understood it would be agreeable to their Lordships, that any farther procedure with regard to this matter should be delayed till next Session, that the Lords might have an opportunity of taking this matter under their consideration during the ensuing vacation.

The Faculty did thereupon resolve to proceed no farther with regard to this matter, till next Session.

(signed) *Alex^r Lockhart*, D. F.

Edinburgh, 24th November 1764.

THE Dean, after resuming the resolution which the Faculty had come to at their last meeting, upon the 11th of August, with regard to delay further proceedings in the affair of Entails till the winter Session, on account of the Lords having signified their desire that the matter should be delayed till then, so as that they might have leisure to consider the same during the vacation; as also, what had been yesterday signified to the Dean and Faculty by the Lord President, as the sense of the court, that it was not proper for them to give any opinion upon it;—acquainted the Faculty, that he had called this Meeting in order to submit to their consideration what measures they were now to take; and as there was to be a Faculty Meeting upon Saturday next, he hoped that gentlemen would come then prepared to deliver their thoughts as to what was proper to be done: Whereupon the Faculty adjourned the further consideration of this matter till this day se'night.

(signed) *Alex^r Lockhart*, D. F.

Edinburgh, 1st December 1764.

THIS being the day to which the further consideration of Taillies stood adjourned, the Dean acquainted the Faculty, that since their last meeting he had been called to attend the Barons of Exchequer; and having accordingly gone with several of the members of Faculty, the Lord Chief Baron had signified it to be the opinion of the honourable court, after having considered the present state and effects of Taillies in this part of the kingdom, That they are highly prejudicial to trade and commerce,—greatly inconvenient to those persons

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whose estates are subject to them, and require the interposition of the legislature for better regulating the same. That they think the endeavours of the Faculty of Advocates to promote a matter of so much consequence to the public utility, are very laudable, and they may depend upon all proper assistance from the Barons in so good a design.

Thereafter the Dean proposed, that the further consideration of this matter should be delayed at present, in regard several members of the Faculty wished to have a little more time to deliberate upon it; and also acquainted the Faculty, that he had, in conjunction with some gentlemen who had given him their assistance formerly, reformed the order of the bill, and also prepared two additional clauses, to be under the Faculty's consideration; and which two clauses having been read in presence of the Faculty, some amendments were proposed, and the Faculty resolved to delay this matter till another meeting.

(signed) *Alex^r Lockhart,* D. F.

Edinburgh, 8th December 1764.

THE Dean acquainted the Faculty, that it was the particular desire of some of their number, that the affair of the Entail Bill should be delayed till Saturday next. This motion was agreed upon by the Dean and Faculty.

(signed) *Alex^r Lockhart,* D. F.

Edinburgh, 15th December 1764.

THE Dean acquainted the Faculty, that he understood some proposals of amendments upon the Bill concerning Taillies were to be offered to the Faculty, which he supposed they would not decline to take under consideration, and that when given in, they should lie upon the table till the anniversary meeting, for the perusal of the members of the Faculty.

(signed) *Alex^r Lockhart,* D. F.

Edinburgh, 22d December 1764.

THE Dean acquainted the Faculty, that the proposed amendments upon the Bill of Entail were not as yet given in, but that when given in (which they would be in a few days) they should lie upon the table till the anniversary meeting; and he hoped the Faculty would then come prepared to resume the consideration of this matter, and deliberate what further was to be done therein.

(signed) *Alex^r Lockhart,* D. F.

Edinburgh, 15th January 1765.

THIS day having been appointed for taking under consideration the matter of Taillies, the Dean resumed the former proceedings of Faculty in relation thereto, and acquainted them, that the amendments upon the proposed Bill, which they had been made to expect, had not been yet given in, and that so many interruptions had happened from various causes, as made it impossible to have a Bill ready to be presented this session of Parliament; but he hoped the Faulty would think it incumbent upon them to go on with this matter, in which they would now have greater latitude in point of time; and therefore he moved, that the Faculty would now hear the heads of the Bill read over, and if it was agreeable in general to the Faculty, he proposed that it should lie over till near the end of the session, and in case any amendments were offered, that they should lie on the table for the perusal of the members of the Faculty.

The heads of the Bill having been accordingly read over, were ordered to lie on the table, with any amendments that may be given in; and the Dean and Faculty appointed Saturday, the twenty-third of February next, for resuming the consideration of this matter.

(signed) *Alex^r Lockhart,* D. F.

Edinburgh, 23d February 1765.

IN absence of the Dean, Mr. Solicitor Montgomery was chosen Præses to this Faculty Meeting.

The Præses represented to the Faculty, that according to their resolution at last (anniversary) meeting, this was the day appointed by the Faculty for taking the subject of Entails under their consideration. But in regard that the Dean was indisposed, he moved, that the Faculty would delay this matter till Saturday next. This motion was agreed to by the Faculty, and they accordingly did appoint Saturday next for resuming the consideration of the same.

(signed) *Ja. Montgomery,* V. D. F.

Edinburgh, 2d March 1765.

IN absence of the Dean, Mr. Solicitor Montgomery was chosen Præses to this Faculty Meeting, who, having taken the chair, acquainted the Faculty from the Dean, that he was extremely desirous that they would this day proceed upon the affair of Taillies, which had been delayed at last meeting on account of his not been present. Upon which, it being moved, that the Faculty would now authorize the Dean to transmit the heads for a Bill as proposed by the Faculty, agreeable to a former resolution entered in the minutes; another motion was made, that as the deliberating upon this matter might take up some time, the candidate then attending should be first examined, which was agreed to.

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The motion for transmiting to the Sheriffs the heads for the Bill anent Taillies being resumed, it was moved, That the whole minutes of Faculty respecting the proceedings with regard to the Taillie Bill, should be read; which was accordingly done.

Moved, to delay transmitting the heads for the Bill prepared by the Faculty, till the 12th of June next, as it was known by some members of the Faculty that the draught of another Bill with respect to Taillies, different in sundry material articles from the Faculty plan, was preparing by certain very respectable persons;—that it was for the honour of the Faculty, who have been left to themselves in this matter, without getting the expected assistance from the other bodies belonging to the College of Justice, that whatever came from them, should be as perfect and complete as possible; and that it was decent and proper to take under consideration any amendments that might be suggested, and all the aid they could get.

Other members of the Faculty supported the motion first made, for transmitting just now, and observed, that this matter had been long under the deliberation of the Faculty; that it appeared from the Faculty's minutes, they had resolved upon transmitting some time ago, but which was then delayed upon its being signified that the lords of Session were desirous the matter should be delayed till the beginning of this present session, so as that they might have leisure to consider of it during the harvest vacation; that when the court sat down, it was signified to the Dean and Faculty, by the Lord President, as the sense of the court, that they were not to give any opinion upon the matter; that therefore the Faculty had been made to expect certain amendments, and on that account delayed further procedure for some time, but which had never been given in; and as to what is now said of a new Bill being preparing, the Faculty ought to pay no regard thereto, seeing it was not laid before them, but proceed to transmit what they had prepared as the heads for a Bill; and when they came back from the several counties, the Faculty would no doubt take under their consideration any alterations or amendments that might be proposed.

Upon which a member of the Faculty having said that the other Bill was just now in the place of meeting; moved, that it should be produced and read; and accordingly there was produced and read, a paper, entitled, Plan of Amendments proposed upon the Act of Parliament 1685, concerning Taillies.

And after some reasoning, the question was stated; Transmit to the sheriffs just now the heads prepared by the Faculty, or delay the same till June next. And a vote being demanded, the roll called, and votes marked, it carried to transmit just now, - - 36 against 10.

Whereupon the Faculty did recommend to the Dean, to cause print the foresaid heads, and transmit copies thereof to the several sheriffs *quam primum*.

(signed) *Ja. Montgomery*, V.D.F.

Edinburgh, 28th November 1765.

THE Dean further represented to the Faculty, that in pursuance of their former recommendations, copies of the heads for a Bill respecting Taillies had been transmitted to the several sheriffs, to be laid before the freeholders and heritors of the several counties in Scotland; that from the resolutions thereupon taken by most of the counties, it appeared to be the general sense of the landed interest, that the law respecting Taillies required amendments or alterations, the particulars of which they submitted to the wisdom of Parliament; that the Convention of Royal Burrows, at their last annual meeting, had unanimously approved of an application to Parliament for the above purpose; and that the Society of Writers to the Signet had likewise signified their approbation of that measure; that it now only remained for the consideration of the Faculty, what further measures were proper to be taken by them. The Dean having made this representation, my Lord Advocate moved it as his opinion, that as this matter had been long under the serious consideration of the Faculty, and that as they had the satisfaction to find their endeavours in this particular have met with general approbation, it is now incumbent upon them to consider of the most proper way of bringing this matter into Parliament, and thus discharge themselves of a subject in which they had taken so much trouble for the general good of this nation;—that for this effect, the Faculty should recommend it to their Dean to transmit a copy of the heads for a Bill prepared by them, together with a letter to be wrote by him, to such of the Peers of Scotland as have a seat in the most honourable the House of Peers, to such of the members of the Faculty as are of the House of Commons, and likewise to the Lord High Chancellor of England, Lord Mansfield, Lord Camden, and to the Honourable Charles York, Esq. Attorney-General, requesting their assistance in obtaining such alterations in the law respecting Taillie, as shall appear to the wisdom of Parliament to be most conducive to the general interest of this part of the United Kingdom.

On the other hand, Mr. John Dalrymple moved it as his opinion, that this matter was not yet ready for going to Parliament, and that the transmission of the draught of the Faculty's Bill thither should be delayed till the returns from all the different counties be laid upon the table, to be perused by the Faculty.

Both motions being seconded, the question was put, Proceed or Delay; and instead of calling the roll, the House divided, and it appeared that six members were for Mr. Dalrymple's motion, all the rest of the meeting, which was pretty numerous, were for proceed. Accordingly, the Faculty recommended it to the Dean to transmit copies of the heads for a Bill, and write letters as in my Lord Advocate's motion, *quam primum*, that this matter might be brought into Parliament this winter session.

(signed) *Alex' Lockhart*, D.F.

Appendix.

The Dean present. Edinburgh, 7th December 1765.

Upon reading the minutes of Faculty of the 28th of last month, which contained, *inter alia*, the resolution of the Dean and Faculty, to transmit the heads for a Bill respecting Taillies in Scotland, to the representatives of the Scots Peers in Parliament, to the Lord High Chancellor of England, Lord Mansfield, Lord Camden, to the Honourable Charles York, Esq. and to such members of the Faculty who are of the House of Commons, in order that when the same shall be moved in Parliament, it may receive their countenance and protection; Mr. John Dalrymple dissented from this resolution of the Faculty, and gave in his reasons of dissent, which being read, were ordered to lie upon the table. At same time Mr. John Swinton, jun. Mr. John Dalrymple, jun. Mr. William Nairne, and Mr. Alexander Murray, were appointed a committee of the Faculty to enquire, What are the precedents for particular members to dissent from any deed or resolution of the Faculty; and to report.

(signed) *Alex^r Lockhart*, D.F.

The Dean present. Edinburgh, 13th December 1766.

The Dean represented, that according to the recommendation of the Faculty last year, he had transmitted copies of the heads for a Bill respecting Taillies, together with a letter to such of the Peers of Scotland as had a seat in the most honourable House of Peers, to such of the members of the Faculty of Advocates as are of the House of Commons, to the then Lord Chancellor of England, Lord Mansfield, &c. requesting their assistance in obtaining such alteration in the law of Entails as should appear to the wisdom of Parliament to be most conducive to the general interest of this part of the United Kingdom;—that as the late Lord Advocate, to whom this affair was entrusted, had no proper opportunity, last session, to bring it into Parliament, and as he was now promoted to the Bench, he imagined the Faculty, if it was agreeable to them, should recommend it to the now Lord Advocate to use his endeavours to bring it into Parliament as soon as he saw a fit opportunity. The Faculty unanimously agreed to this motion.

(signed) *Alex^r Lockhart*, D.F.

The Dean present. Edinburgh, 12th December 1767.

The Dean acquainted the Faculty, that he understood a great many of the heirs of Entail in this country were to make application to Parliament, for an amendment of the Act respecting Tailzies; that it was his opinion, the Faculty should give them all the assistance in their power in that matter; and that for this purpose, he moved, That he should be authorized by the Faculty to renew the application formerly made to my Lord Advocate, to use his endeavours to bring into Parliament the heads for a Bill concerning Tailzies, drawn up by the Faculty, as soon as he saw a fit opportunity so to do. The Faculty unanimously agreed to this motion.

(signed) *Alex^r Lockhart*, D.F.

§ Extracted from the Records of the Faculty of Advocates.

David Irving, C.F.

JURIES (SCOTLAND.)

REPORT

OF THE

COMMISSIONERS appointed by His Majesty's Warrant of the 19th day of August 1826, for inquiring into the Forms of Proceeding in Trials of Civil Causes by Jury in *Scotland*;

Dated 9th day of March 1827:

TOGETHER WITH AN

APPENDIX OF MINUTES OF EVIDENCE,

&c.

Ordered, by The House of Commons, *to be Printed,*
15 *May* 1827.

GEORGE R.

INSTRUCTIONS for Our Commissioners appointed under Our Royal Sign Manual, in furtherance of an Act, intituled, "An Act for the better regulating the Forms of Process in "the Courts of Law in *Scotland*."

Given at Our Court at Windsor the nineteenth day of August 1826.

1.—YOU are duly to examine such of Our Judges, Members of the Faculty of Advocates, Writers to the Signet, and other persons, as you may think best qualified to give you useful information.

2.—Each of you is to give to the others such information, touching the matters of your inquiry, as shall appear to be useful; and also, so far as he is able, such information as the other Commissioners may be desirous to obtain from him touching such matters.

3.—You are to report to Us, what, in your opinion, would be the earliest period at which the union of the benefits of Jury Trial in Civil Causes with the jurisdiction of the Court of Session may be best accomplished.

4.—You are to report to Us, what, in your opinion, would be the best and most expedient mode in which the Trial of Civil Causes by Jury can be advantageously connected with, and made a part of, the administration of justice in the Court of Session; and what would be the most beneficial manner in which such Trial by Jury should proceed before the Judges of that Court.

5.—You will report to Us, what, in your opinion, would be the best form of proceeding, in regard to the preparation and Trial of Civil Causes by Jury, after such union shall have been accomplished; and whether any, and what, changes, in such form of proceeding, ought to be introduced, as preparatory to such union, and while the Jury Court remains constituted as at present.

G. R.

REPORT

By the Commissioners appointed by Royal Warrant for inquiring into the Forms of Proceeding in Trials of Civil Causes by Jury in *Scotland*.

TO THE KING's MOST EXCELLENT MAJESTY.

WE, the Commissioners appointed for inquiring into the Forms of Proceeding in Trials of Civil Causes by Jury in *Scotland*, beg leave humbly to report to Your MAJESTY, That, in obedience to Your Majesty's Warrant, we met within the Parliament House of Edinburgh on the fourth day of September last, and have continued our deliberations at various adjourned meetings. Art^s 1. & 2.

In regard to the 1st and 2nd Articles, as having reference to the subsequent Articles of Your Majesty's Instructions, we humbly report to Your Majesty, That, as the subjects referred to us relate entirely to matters of opinion, and as our opinions on those subjects must rest exclusively on the actual state of business in the Jury Court, and on the progress which has been made in maturing the system of Trial by Jury in Civil Causes by that Court, we conceived that we should derive the best and most useful information from the Members of that Court and its Clerks, and from some of our own body conversant with that system. To them we added Mr. Moncreiff, who has been elected Dean of the Faculty of Advocates since the date of Your Majesty's Commission to us.

If any further information had appeared to us to be necessary to enable us to form an opinion on all the points of Your Majesty's instructions, we would have had recourse to the examination of other persons; but we are of opinion, that the statement made to us by the Lord Chief Commissioner of the Jury Court, in answer to the questions which we put to him; the evidence of Lords Pitmilly, Gillies, Cringletie and Mackenzie, all of them Judges of the Jury Court; of Messrs. William Clerk, Murray and Russell, clerks of that court; of Mr. Moncreiff, the Dean of the Faculty of Advocates; of the Solicitor General, and of Mr. Jollie (all of which we have annexed as an Appendix to this Report,) contain a body of information amply sufficient to enable us to answer the different points referred to us in Your Majesty's instructions.

Having thus acquired all the information which we deemed to be necessary on the different matters referred to us, we have maturely deliberated thereon, and now beg leave humbly to report our opinion on the different Articles of Your Majesty's Instructions, in the order in which they stand in the instrument under Your Majesty's Royal Sign Manual. Art. 3.

By the 3d Article of Instructions, we are required to report to Your Majesty, What, in our opinion, "would be the earliest period at which the union of the "benefits of Jury Trial in Civil Causes with the jurisdiction of the Court of "Session may be best accomplished."

In obedience whereto, we humbly report to Your Majesty, That it is ascertained to us, that the Juries who have been employed in the determination of causes before the Jury Court, have been distinguished for attention, intelligence, and integrity: That the mode of presiding over Juries, as now conducted, has answered the object: That the law of evidence, according to the rules of the law of Scotland, has been successfully administered, and found perfectly applicable to Trial by Jury: That the law of Scotland in its principles, has been uniformly dispensed in the Jury Court: That the system of rules applicable to the granting or refusing new trials is well understood; and, in general, that what belongs to Trial by Jury in Civil Causes, in all the above respects, has made such progress as to sanction an union of the Trial by Jury in Civil Causes, with the ordinary jurisdiction of the Court of Session at the present period; but that in the preparation of causes for trial, and in the framing of issues, and also in the matter of bills of exceptions, and special verdicts and special cases, the same progress has not been made, owing to causes which are stated in the information, which we have received from the Judges and Clerks of the Jury Court, to which we have already referred.

The progress, however, which has been made in those branches of the institution has been such, as to warrant us to state it as our opinion to Your Majesty, that the union of the benefits of Jury Trial in Civil Causes with the jurisdiction of the Court of Session, may be beneficially accomplished at or within the period contemplated in the Act of the 6th of Your Majesty, c. 120. due provision being made that the alteration shall not take place during the currency of a Session of the Court.

We give this opinion to Your Majesty, that the union may be most beneficially accomplished at the above period, or even within it, if necessary; because the system of Jury Trial does appear to us to be already as much matured as it was possible to expect in the period which has elapsed since its institution. But we are at the same time satisfied, that it will make a still greater and more rapid progress towards perfection, if allowed to continue for some time longer under the superintendence of the present Lord Chief Commissioner. By the Act of Parliament above referred to, two additional Judges were added to the Jury Court. By this means the Lord Chief Commissioner has received additional assistance in the preparation of causes for trial, and two more Judges will, in the course of the intermediate time, become masters of the practice of that court, while, at the same time, a knowledge of the practice will become daily more familiar and extended among the different members of the profession. Some improvements, also, have been suggested to and approved of by us, which will have a tendency still further to ripen the practice in the preparation of causes. These improvements we shall humbly submit to Your Majesty, in answer to the last article of our instructions; and, as many of them can be authorized by Act of Sederunt, in virtue of the powers vested in the Court of Session and Chief Commissioner of the Jury Court by the statute, we understand that it is the intention of that court to pass such an Act of Sederunt, in order to carry those improvements into effect.

Art. 4. By the 4th Article of Your Majesty's instructions we are directed to report, what, in our opinion, "Would be the best and most expedient mode in which the "Trial of Civil Causes by Jury can be advantageously connected with and made "a part of the administration of justice in the Court of Session; and what would "be the most beneficial manner in which such Trial by Jury should proceed "before the Judges of that Court."

In obedience thereto, we humbly report to Your Majesty, as our opinion, That the preparation of Causes for Trial by Jury ought to be vested in the Lords Ordinary of the Court of Session, aided and assisted, as the Judges of the Jury Court

Court are at present, by the Clerks of the Issues; and that the Causes should continue to be prepared by the Lords Ordinary of the Court of Session, in the same manner as they are now, or shall be prepared by the Judges of the Jury Court, at the time when the union shall take place; the Lords Ordinary and Issue Clerks having recourse, when necessary, to the Lord President of the division, in the manner now practised with the Lord Chief Commissioner of the Jury Court.

In order to adapt the preparation of Causes and Issues from time to time to the particular situation of such preparation, we humbly propose, that the Court of Session should have power to pass Acts of Sederunt to regulate the manner in which the preparation in respect to Jury Causes should be conducted by the Lords Ordinary; such Acts of Sederunt to be reported to both Houses of Parliament within fifteen days from the day on which they are passed, or, if Parliament be not then sitting, within fifteen days after the next meeting of Parliament.

By the statute, § 28, certain actions are appropriated to the Jury Court; and, by the 29th sect. the Lords Ordinary are required forthwith to remit such Causes to the Jury Court.

After the union, these clauses will become inapplicable, and must be varied. The causes now appropriated, and any others which it may be thought beneficial to add to the list, must be declared to be cognizable, not by the Jury Court, but by the mode of Trial by Jury. And the Lord Ordinary, instead of remitting them to the Jury Court, must be ordained, on the first enrolment of the cause, to pronounce an interlocutor, declaring such causes to be cognizable by Jury Trial, and ordering them to be prepared accordingly.

But if, after the cause shall have been prepared and the record closed, or ready to be closed, "both parties shall concur," as set forth in the 33d sect. of the above Act, "in a minute or note to the Lord Ordinary, requiring that any "question of law or relevancy arising out of the pleadings to be specified in such "minute or note, shall be determined before going to trial," the Lord Ordinary, if the request shall appear just or reasonable, shall take such question of law or relevancy to report to the Inner House, either verbally or on cases, as he shall consider to be most expedient. But if either party shall, without the concurrence of the other, give in a minute or note to the above effect, the Lord Ordinary shall determine whether the question stated in such minute or note ought to be decided previous to trial, or left for discussion at the trial, or for decision after verdict; and the interlocutor to be pronounced thereon by the Lord Ordinary, in either of the above cases, shall be final, unless brought by reclaiming note before the division, within twenty-one days after the interlocutor of the Lord Ordinary shall be pronounced. And the interlocutor of the Lord Ordinary, if not reclaimed against, or of the Inner House, on advising said note, shall not be subject to appeal to the House of Lords, to the effect of stopping the Trial, reserving to the party his right to appeal on the point of law after verdict.

And, in general, we humbly give it as our opinion to Your Majesty, that all the rules and regulations in force in the Jury Court, at the time of union with the Court of Session, *mutatis mutandis*, should continue to be the rules and regulations of that Court, till regularly altered by Acts of Sederunt, to be reported to Parliament, as directed by the above Act of Parliament.

In regard to the actual Trial of Causes by Jury, we humbly give it as our opinion to Your Majesty, that the same should be presided over and conducted by the Lords Presidents of the Divisions of the Court of Session, each presiding in the Causes originating in his division, due provision being made for the death, sickness, or necessary absence of the President.

We beg leave, however, at the same time, humbly to give it as our opinion, that either party shall have power to move the division to which the cause belongs, that the trial shall be had before that division; and that in such cases the Lord Ordinary in the cause may form part of the quorum; and in case it shall be made to appear to the Court, that difficult questions of law or evidence are likely to arise on the trial, the Court may, in its discretion, order the cause to be so tried.

And in like manner, if it shall appear to the President of the division, on considering the cause, to be expedient, he shall have power to order that the cause shall be tried before the division, constituted as above mentioned.

When one division of the Court of Session directs a special issue to be tried for its information, on matters of fact, we humbly propose, that such issue should be tried before the President, or some other Judge of the other division, and the verdict returned to the division which so directed the issue.

In regard to Causes for Trial on the Circuit, which hitherto have been, and for some time will probably be, few in number, we humbly beg leave to propose to Your Majesty, that they should take place before the Lords of Justiciary on their circuits.

At the same time, it appears to be proper that it shall be competent for the Lord President to go on any circuit, when expedient for the dispatch of business.

In regard to the redress of errors, or injustice alleged to have been committed in the trial of a cause, whether such redress is sought by motion for a new trial, by bill of exceptions, or otherwise, and in regard to the determination of points of law reserved on special verdicts, or special cases, we humbly report to Your Majesty, that all such matters should proceed before the division of the Court, or quorum thereof, to which the cause belongs, whose judgment should be final, and liable to review only by the House of Lords, on points of law.

Art. 5. Under the 5th Article, we are required to report what, in our opinion, "Would "be the best form of proceeding, in regard to the preparation and Trial of Civil "Causes by Jury, after such union shall have been accomplished; and whether "any and what changes in such form of proceeding ought to be introduced as "preparatory to such union, and while the Jury Court remains constituted as at "present."

On this head, we beg leave humbly to report to Your Majesty, as our opinion, That immediate measures should be taken by Act of Parliament, or Act of Sederunt, as the case may be, for carrying into effect the following suggestions, as tending still more to improve the system of Jury Trial, and which ought not to be delayed till the period of union.

1^mo^. Provision should be made for a proceeding, analogous to a nonsuit in England, whereby the pursuer may abandon his action, with the leave or by direction of the Court; but, in both cases, under such regulations as will not affect the interests of justice. This measure will require the authority of Parliament.

2^do^. By the original regulations of the Jury Court, it was ordered that parties should exchange lists of witnesses before trial. But it was reported by the Commissioners appointed by Your Majesty's warrant of 29 July 1823, that such practice had been found to be attended with inconvenience; and therefore, by the 35th section of the above Act of Parliament, that regulation was repealed. But we beg leave humbly to report to Your Majesty, that it has been stated to us by all

all the Judges of the Jury Court, and by other persons having had extensive practice in that Court, that the abolition of that practice has been attended with great injustice in many cases, and much greater inconvenience than ever resulted from the practice itself; and, therefore, we respectfully report it as our opinion to Your Majeety, that the above 35th sect. of the Act 6 of Your Majesty, c 120, should be repealed, and the former practice of exchanging lists of witnesses revived, in terms of the original regulations of the Jury Court. This measure also will require the authority of Parliament.

3^tio^. We further humbly report to Your Majesty, in reference to the union of the two jurisdictions, That, in the meantime, it would be of material advantage, if on arguments for new trials, (when the motion is made before either of the two divisions of the Court of Session) and on all arguments on bills of exceptions, special verdicts, or special cases, the Lord Chief Commissioner were empowered to sit and have voice in the division before which such cases are to be argued. This will also require the authority of Parliament.

We also beg leave respectfully to report, That at present the preparation for Causes for Trial in the Jury Court, is conducted in a manner which, in practice, is found to produce inconvenience and delay. The early part of the preparation is conducted before one of the junior Judges of the Jury Court, and the causes are enrolled in what is called his hand roll. Thereafter, when the cause is supposed to be sufficiently prepared for framing the issue, it is transferred into what is called the Jury Court preparation Roll, and the cause then proceeds before the Lord Chief Commissioner, assisted by the Issue Clerks. Now, we humbly give it as our opinion to Your Majesty, that this distinction of rolls should be abolished, and the causes be enrolled in one roll, and proceed before the Lord Chief Commissioner and the junior Judges of the Jury Court, for preparation from first to last.

As the present division of rolls is regulated only by an Act of Sederunt, so the alteration we propose may be made by the same authority; and we understand that the Court of Session and Lord Chief Commissioner, are to pass an Act of Sederunt accordingly.

We also humbly report to Your Majesty, That it is our opinion that the regulation of the 34th sec. of the Act 6 of Your Majesty, c. 120, whereby it is enacted, that the pursuer *shall* deliver to the Clerk of the Jury Court, the issue or issues in the cause which he may conceive to be proper for trial, prepared and signed by counsel, ought to be more strictly enforced than it has been. For by reason of a subsequent provision in the said clause, whereby it is enacted, that if the issue shall not be delivered by the party, the Court shall direct a proper issue to be framed by the clerk, the pursuers have been too much in the practice of neglecting to prepare their own issues. Now, it humbly appears to us, that it is very material that the counsel and agents should be habituated to the framing of issues, both that it may become a part of their duty, independently of the assistance of the present issue clerks, whose lives and incumbencies are uncertain; and because, if counsel and agents are compelled to have in view from the beginning, the issue which may be proper for the trial of the cause, it must have a powerful effect in improving their practice in drawing the condescendences of facts out of which the issue is to arise; and we humbly propose, that in cases where it is necessary, that there should be an issue on the part of the defender, he shall also proceed in the manner above directed.

We also report it to Your Majesty as our opinion, while the present Jury Court continues, That when causes are re-transmitted by the Jury Court to the Lord

Ordinary of the Court of Session, for the purpose of having a point of law or relevancy determined previous to the trial, the Lord Ordinary shall report the same to the Inner House either verbally, or on cases, as to him shall seem expedient. And that in the case of dilatory defences, the Ordinary shall proceed as heretofore; and the interlocutor of the Court on such points shall be final, so as not to prevent the trial from proceeding, reserving to the party to appeal on such point of law to the House of Lords, after verdict.

This matter may be also properly regulated by Act of Sederunt.

The above suggestions comprise the best opinion which, at present, we are able humbly to offer to Your Majesty, on the different matters referred to us in Your Majesty's instructions.

And, if circumstances do not materially change, we confidently hope that the mode in which we have proposed to Your Majesty, that the union of the benefit of Jury Trial, with the ordinary jurisdiction of the Court of Session, shall take place, will prove practicable and beneficial, and will firmly establish that mode of trial in Scotland, as part of the daily and ordinary administration of justice in the Court of Session, in all actions to which it can be usefully and successfully applied.

Three of the Commission, namely, Adam Gillies of Gillies, George Cranstoun of Corehouse, and George Joseph Bell, Esquire, Advocate, concur in the preceding Report, that at or within the period contemplated by the statute 6 Geo. IV. c. 120, the union of the benefit of Jury Trial with the jurisdiction of the Court of Session may be beneficially accomplished; that is, that all the functions of the Jury Court may then be discharged by the Court of Session. They further concur as to the changes suggested to be made on the forms of procedure, while the present Jury Court continues, and the other material parts of the Report; but they differ from it as to the manner recommended for carrying on Trial by Jury, after the proposed union takes place.

All which is humbly reported by

(signed) C. HOPE.

Signed by appointment of a General Meeting of the Commissioners held upon the ninth day of March 1827.

WM RAE.
D. BOYLE.
S. SHEPHERD.
WILLIAM ADAM.
D. MONEYPENNY.
AD. GILLIES.
DAVID HUME.
GEO. CRANSTOUN.
JOHN HOPE.
GEORGE JOS. BELL.
JAMES JOLLIE.

APPENDIX.

MINUTES OF EVIDENCE.

Edinburgh, Friday, January 12, 1827.

N° I. — Lord Cringletie, one of the Lords Ordinary.

N° II. — Lord Mackenzie, one of the Lords Ordinary.

N° III. — John Russell, esquire, Clerk to the Signet.

N° IV. — Joseph Murray, esquire, Advocate.

Wednesday, January 24, 1827.

N° V. — William Clerk, esquire, First Principal Clerk of the Issues in the Jury Court.

N° VI. — James Moncrieff, esquire, Dean of the Faculty of Advocates.

Saturday, January 27, 1827.

N° VII. — Mr. Solicitor General, a Member of the Commission.

Saturday, February 3, 1827.

N° VIII.—James Jollie, esquire, Writer to the Signet.

N° IX. — Requisition of the Lord Chief Commissioner; with Answers thereto.

Wednesday, 7th February 1827.

N° X. — Lord Pitmilly, one of the Judges of the Jury Court.
Lord Gillies, one of the same.
The Lord Chief Commissioner.
The Lord Chief Baron.
Mr. Solicitor General, further examined.
Mr. Jollie.

Tuesday, 13th February 1827.

Lord Corehouse, one of the Judges of the Court of Session.
George Joseph Bell, esquire, Advocate.

APPENDIX;

VIZ.

MINUTES OF EVIDENCE

Taken before the Commissioners appointed under His Majesty's Royal Sign Manual, for inquiring into the Forms of Proceeding in Trials of Civil Causes by Jury in *Scotland.*

Edinburgh, Friday, January 12, 1827.

The Right Honourable LORD PRESIDENT in the Chair.

The Honourable Lord *Cringletie*, one of the Lords Ordinary in the Outer House of the Court of Session; called in, and Examined.

Minutes of Evidence.

Lord *Cringletie.*

IS Your Lordship one of the Judges of the Jury Court, last appointed?—I am.

As such, do you attend as Lord Ordinary in the Outer House, in regard to the preparation of Jury Court Causes?—I do.

Will you state the mode of proceeding which takes place before you in the Outer House, in Jury Court Causes, in respect to the summons and defences, when the parties agree to rest their case upon that proceeding?—I have never had an opportunity of seeing the parties willing to close their record upon the summons and defences alone.

Will you state the mode of proceeding which takes place before you when condescendences and answers are required, and notes of pleas in law, and the steps which are taken by you previous to ordering the causes to the Jury Court preparation roll?—The question supposes appearance to have been made for the defenders, because without that nothing can be done but to remit the process to the Court of Session. When defences have been put in, I order a condescendence to be given in within a certain time, and the answers also within a fixed time afterwards; when these are put in, I order them to be revised respectively, and given in with notes of pleas in law within a specified time; and when they are put in, and the cause has been enrolled, I remit it to the preparation roll.

In the press of your business generally, have you been under the necessity of sending causes to the preparation roll, without being able to accomplish such an investigation of the different legal instruments, as to insure their being sufficiently precise and accurate for the formation of Issues, without further amendment?—I believe that I should often have been obliged to do so on account of the pressure of business; but the truth is, the Act of Sederunt, in its sixth section, relative to the Jury Court, directs, that as soon as the condescendences and notes of pleas are put in, and they are all revised, the cause shall be sent to the preparation roll direct, whereby I could not have an opportunity of perusing the pleadings before sending the causes to that roll.

Will your Lordship have the goodness to state, whether you see any objection to the whole proceeding being conducted in one roll?—I have had that in contemplation, and I may say, that I can answer with certainty that the abolition of any distinction between the hand roll of the Lord Ordinary, and the preparation roll, will be attended with the best effects. By the late existing practice, the Lord Chief Commissioner had no opportunity of seeing the process at all in its prior stages, for it was carried on before the Lord Ordinary of the Jury Court in the Outer House, where the Lord Chief Commissioner could not come. The preparation roll was therefore intended to bring the case before his Lordship, and it had

Minutes of Evidence.

Lord *Cringletie*

that effect. Now, that his Lordship is to sit in the Outer House with the Lords Ordinary, there is no use for the preparation roll. When parties are ready to close their record, the Lord Ordinary should make avizandum with the process. The clerk to the Issues will then consider it, and transmit it to the Lord Chief Commissioner and the Lords Ordinary, with proper remarks, after which, the cause may be put into a roll for a certain day, to give the parties notice to attend the Court, when the Lord Chief Commissioner and the Lords Ordinary will hear the parties, order the record to be closed, and appoint the Counsel for the parties to prepare Issues, in terms of section 34, chapter 120, of the 6th George IV. I am decidedly of opinion, that this will be of the utmost advantage to the system in every department, and above all, the preparing of Issues by the Counsel will point out to them the necessity of a proper condescendence and answer, because out of them the Issues naturally arise, and by those means the system will be gradually matured, and generally understood.

Has your Lordship, at any time, had recourse to discussion with the Counsel of the parties, as to the nature of the proceeding which takes place in the Jury Court in the preparation of Issues, to ascertain the accuracy of summons and defences, and the precision of averments in condescendences and answers?—I have not hitherto, with the exception after mentioned, on account of the cases being remitted to the preparation roll, when they were in that state of forwardness. They were always laid before the Lord Chief Commissioner, until his Lordship was unfortunately confined by indisposition this winter. During his Lordship's indisposition, I had an opportunity of entering into discussion with Counsel on different cases in which Issues had been prepared, and adjusted one which was a General Issue.

Did your Lordship find those discussions with the Counsel and Agents a great advantage in the preparation of Issues?—I did.

Does it seem to be of use in making them understand the mode of proceeding?—Decidedly.

Are you of opinion that, in future, such discussions will be more advantageous than public discussions at the bar, with regard to the preparation of Issues, at least for some time, until the system is better understood?—A great deal better. I think the mode of preparing them, by means of conversation with Counsel, will do the business much more accurately, and in much less time, than any discussion that takes place at the bar, at least until the system is more matured.

Are there any suggestions, in the way of farther improvement, which occur to your Lordship?—The Lord Chief Commissioner mentioned to me a little time ago, a suggestion, which I think would be an improvement; that is, the printing the Condescendences and Answers prepared for the Jury Court, if on them any discussion is to take place. There being five of us, the written papers would have to be handed from one Judge to another, which creates delay; but by being printed, we may all consider them at the same time, and be sooner ready to give our opinions.

Does not your Lordship think it would be a great convenience, even in cases that have gone to a Jury, to have the facility of referring to printed Condescendences and Answers?—Certainly.

Has your Lordship had any opportunity of communicating much with Lord Mackenzie, or the Lord Chief Commissioner, or any others of your Brethren in the preparation of causes?—No, I have not, or at least very seldom.

Has there been any judicial communication between your Lordship, Lord Mackenzie, and the Lord Chief Commissioner, in the preparation of causes?—Sometimes, when we have been in the Lord Chief Commissioner's chambers.

But has there been any communication of that sort in those acts of preparation done in the Outer House?—No, none at all.

Does your Lordship consider that that communication which hitherto you have not been able to introduce will, in a great measure, be secured by the new measures which are contemplated?—Yes, by uniting the Preparation Roll and the Hand Roll into one.

Will not great facility also arise from the new arrangement, as to where the Court is to sit?—I think there will.

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Lord *Cringletie.*

Your Lordship is aware of the necessity which at present exists in many cases, of transmitting and retransmitting papers from the Court of Session to the Jury Court, and from the Jury Court to the Court of Session, in consequence of points of law occurring. Do you consider that as a great inconvenience to the furtherance of business?—I consider it to be a great inconvenience, both as occasioning delay in the proceedings, and additional expense.

And does your Lordship think that that inconvenience, delay, and expense will be saved, if the two jurisdictions are united?—I do.

Does not your Lordship think it would be a considerable improvement in the transmission of processes from the Jury Court to the Court of Session, if it could be fixed by an Act of Sederunt, that the Lord Ordinary in the Court of Session should either verbally report, or order cases immediately to the Divisions respectively, instead of a discussion going on before himself as to certain points?—There is only one case of that kind that is alluded to in the Act of Parliament, viz. where parties think that there is a question of relevancy that ought to be decided before trial. In that case the act provides, that if the Lord Ordinary of the Jury Court shall have any difficulty in the matter, he shall report it to the Court; or if he pronounce his own judgment on that subject, it is to be carried by review before the whole Jury Court itself, who are to decide upon that point.

The question put refers to transmissions from the Jury Court to the Court of Session, after it has been determined to retransmit; and it is with a view to supersede discussion before the Lord Ordinary in the Court of Session this is suggested. Do you consider that it would be an improvement to pass an Act of Sederunt to that effect, as a means of getting the matter of retransmission considered immediately on its merits in the Inner House; and that for that purpose the Lord Ordinary should be required to take those points to report either verbally or by cases, as he should think proper?—I understand the question to refer to the event of the Lord Ordinary of the Jury Court thinking it right to transmit the process to the Court of Session; and in that case it would be an improvement that he should report it as proposed.

Your Lordship is aware, that at present, if dilatory defences are put in, the Jury Court has no jurisdiction over them; but they must be sent to the Court of Session. Would it be an improvement if the Jury Court were allowed to judge of dilatory defences also?—I think so.

Reserving the power to transmit to the Court of Session when the Judges think fit?—Clearly. There is one discussion upon which the Lord Ordinary of the Jury Court may at once decide, namely, any objection to the formality of the summons and defences, whether stated by the parties, or occurring to himself.

At present your Lordship is aware, that trials may proceed before one of the Judges of the Jury Court; but that it is in the power of the parties to move for a trial before the whole Court, or a quorum of it; or it is in the power of the Lord Chief Commissioner to require the attendance of his brethren in cases of difficulty and importance. Do you think, in case both parties concurred in requiring a trial regarding such cases before a quorum of the Court, it would tend to remove any objection or difficulties in the furtherance of Trial by Jury, if that was granted, or if more Judges than one were to attend?—If trials in presence of three or more Judges were to be granted at the request of both parties, I imagine that such application would be made in almost every case, which might be extremely inconvenient. They do ask it in some cases, and are refused, where the case is not of any difficulty or importance.

Are those cases you allude to cases in which both parties concurred in the request?—We have never had an opportunity of knowing that; for the motion has generally been made by one of the parties, and not being opposed by the other, we presume it is the wish of both parties.

Is your Lordship aware, that since passing the late Act of Parliament, there have been only five motions for trial at Bar?—I do not know the number, but I have been present when motions were granted for trials at Bar, and when there were motions for it which were rejected.

In one of the two cases in which motions are stated to have been rejected, was it not a fact, that the Counsel withdrew the motion, it having been made without his knowledge by the Agent?—I cannot speak to that.

Is

Is your Lordship of opinion, if it were imperative that both parties should concur before the trial at Bar should be granted as a matter of course, that all danger of a party being oppressed by a richer adversary would be done away?—I am not aware that a trial at Bar occasions any oppression to the adversary at all. Were a motion made to have a trial set down at Edinburgh remitted to Glasgow, or in the same way, if a motion were made to bring a cause from the country which would otherwise be tried at the Circuit, to be tried at Edinburgh, I presume the Court would take it into consideration, and refuse it, if it were an oppression on one of the parties. If both parties concurred in having it brought here, there could be no oppression.

Will you have the goodness to state, whether in point of fact more Judges than one have not always been present in any case that was considered to be of much importance, since your Lordship has sat in the Jury Court?—I believe since Lord Mackenzie and myself have set there, one or other of us have generally made it a point to attend the Court for our own information.

Has it not frequently turned out, that in the progress of the trial your Lordship saw the attendance of more Judges than the presiding one utterly useless for the purpose of conducting the business of the cause, and only useful with reference to any information your Lordship might wish to obtain?—I have seen some causes where we supposed our presence was of advantage, and in others none at all.

Your Lordship will observe, that by the Act of Sederunt, which regulates what are vulgarly called trials at Bar, but what are properly described in the Act as trials before not less than three Judges, the Court are empowered to order a trial to take place on the application of parties, provided it is a matter of difficulty or magnitude; does your Lordship conceive that in cases which do not fall within that description, it would be advantageous to require the attendance of more than one Judge?—I certainly do not, in matters of no difficulty or of common occurrence.

Do you think there is a certain satisfaction afforded to parties in being able to obtain from the discretion of the Court the attendance of three Judges, when the case is one of magnitude and importance?—I certainly do so.

Does your Lordship conceive that the present Act of Sederunt is adequate to all the objects that parties could wish by enabling them to get such an attendance, or does it occur to you that there is any improvement to be made in the Act of Sederunt?—I do not know of any improvement that could be made in that particular. If it shall be made imperative on three Judges always to be present, or two Judges, I can see that there will be many trivial cases in which it will be just taking up the time of one of these Judges unnecessarily.

Does your Lordship conceive it would be advantageous or fit to be a subject of regulation, that, in cases of magnitude and difficulty, the united application of the parties should compel the attendance of more than one Judge, or that it should be left to the discretion of the Court when both parties are applying?—If I were to make the regulation myself, I should think the discretion of the Court would give that sort of assistance to the parties on every occasion, without its being made imperative on the Judges to do it; I would leave it without *compulsitor*, and I believe there would be no ground of complaint upon that subject; for in every case of magnitude and importance there has been the attendance of a quorum.

What injury does your Lordship think would arise from the attendance of more than one Judge?—None, but the unnecessary consumption of the time of one of them.

Must it not be useful to have more than one in regard to questions of difficulty occurring in ordinary trials?—Perhaps it would; there may be cases where a difficult question of evidence may arise, and it is very difficult to foresee it; I am quite aware of that, but, at the same time, they do not often occur; and because a difficult question may once occur, to compel the attendance of more Judges than one, on every occasion, I should think very hard.

You mean it would be hard on the individual Judge required to attend?—Yes, for he has a great deal to do besides, and the more particularly as there is always a remedy in case of a Judge doing wrong by admitting improper evidence, or by giving erroneous direction to the Jury, for it will be put right by a Bill of Exceptions, or

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or by a motion for a new trial; and I do not think that such bill or motion would be prevented by the opinion of another Judge concurring with his brother in a question of difficulty.

Lord *Cringletie.*

Will your Lordship have the goodness to inform the Commissioners, whether in grave and difficult questions of evidence, a Court, consisting of more Judges than one at the trial, is the best method of having it solved, or is it better to have it deliberately done by a Bill of Exceptions, or a motion for a new trial?—I think it would be better by a Bill of Exceptions, or motion for new trial; for at the trial the Judge has no opportunity of consulting authorities, and must just give the best opinion he can at the time, since the trial must go on; whereas if a Bill of Exceptions is taken, or a motion be made for a new trial, he can have time to take the debate to his closet, and reconsider it thoroughly.

Does not the trial before one Judge, and his decision on such a point, secure against the possible prejudice arising from a pledged opinion, and leave the minds of the reviewing Court more open and fit for discussion, than if they had all come to that opinion at the trial?—That is a matter of idea very much; I should hope that even supposing there were three, or the whole five present, and that they gave an opinion on a difficult point at a trial, they would come to the reconsideration of it with unprejudiced minds, but it is impossible to say whether they would or not.

In cases requiring the presence of more Judges than one, do you think it quite sufficient to leave it to the discretion of the Court to require the presence of more of their brethren, or would you leave it to both parties to desire it?—I have said before, I think it is better to leave it to the discretion of the Court.

His Lordship withdrew.

No. II.

The Honourable Lord *Mackenzie*, one of the Lords Ordinary in the Outer House of the Court of Session; called in, and Examined.

Lord *Mackenzie.*

YOUR Lordship having heard the evidence given by Lord Cringletie, will you have the goodness to say, if you generally concur in the answers given by him to the questions; or, if not, in what particulars you differ?—In general I did concur; but there were some particulars in which I cannot say so.

Will your Lordship have the goodness to state those particulars?—I may mention, first, that there was one matter on which I cannot so much say that I have an opposite opinion, as that I am not quite sure I understood the questions and answers. I allude to the questions and answers respecting what should be done in case of a remit from the Jury Court to the Court of Session.

When it is absolutely necessary for the Jury Court to retransmit a case to the Court of Session for the determination of a previous point of law, would you have the goodness to state whether, in your opinion, if it were so transmitted to the Court of Session, it would not be an improvement, and save a great deal of delay and expense, if the Lord Ordinary of the Court of Session were to be required imperatively to take the cause to report verbally, or by cases?—Yes, I think it would be an improvement. I understand now that this was what Lord Cringletie approved of, and I agree with his opinion on the point. There is another point on which I do not precisely agree with what was said by his Lordship, I mean with regard to dilatory defences. I am of opinion, that it would be useful if the Jury Court had the power of determining upon dilatory defences, provided that Court had the power of determining also upon other defences; in short, had full jurisdiction in the cases that came before it. But I think, unless the Jury Court have full jurisdiction of this kind, it would be difficult to give it the power of determining upon dilatory defences. My own opinion is, that there would be great convenience in giving the Jury Court full jurisdiction; but I think it might be found inconvenient to give this Court jurisdiction limited to dilatory defences, particularly as it is often a matter of nicety whether a defence is dilatory or not.

Do you think all such difficulties and objections would be done away if the jurisdictions were united into one Court, whether that were the Jury Court or the Court of Session?—Yes, I think so.

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Lord *Mackenzie.*

How long has your Lordship been a Judge of the Jury Court?—About one year.

Have you in that time tried any cause yourself alone?—I have tried two causes [the only causes I have tried] when I was alone, one was on the Circuit, and one here; of course I have been present on the bench in a much greater number of trials; but the Chief Commissioner, or one of the senior Judges, has presided. I am junior Judge of the Jury Court.

Was one of the cases you tried a case of considerable length?—One was a case of great length.

How long did it last?—The greater part, or I may say, the whole of two days.

Was it a case of new trial, in which a verdict had been previously given in the Jury Court?—It was.

From your Lordship's experience, did it appear to you that there was any extraordinary difficulty attending the discharge of that duty, which one of the Presidents of the Court of Session might not have overcome?—Most certainly not.

It does not occur to you that there is any difficulty in the union of the Jury Court and the Court of Session, so far as the trial is concerned?—That is a wider question; I have not fully thought about that; there may be difficulties of different sorts.

But merely in trying the cause when the mode of trial was quite new to your Lordship, did you find any more difficulty than you would suppose any other Judge of the Court of Session, or either of the Presidents would have found?—I think either of the Presidents of the Court of Session, having made such preparation as I had, would certainly have been as competent to try the case as I was, or much more so. Without some preparation, I conceive neither of the Presidents, nor any other Judge could have tried it safely. He could not have known the form of proceeding. I may add, however, that I should be very sorry to have my own powers, at the time of that trial, taken as any standard.

How many years before that had your Lordship been appointed to assist in the Justiciary Court?—About one year before.

Is your Lordship of opinion that any Judge, even Lord Mansfield, would try a case as well the first day he sat on the bench, as when he had been there several years, considering that a judge must improve by experience?—He must improve of course.

Have any subsequent proceedings arisen out of the case to which reference has recently been made, to intimate, that either party was dissatisfied with what occurred in the course of that trial?—I have not heard of any.

Has there been any motion for a new trial, or was any Bill of Exceptions taken?—No.

Did the verdict correspond with the one which had been pronounced on the first trial, or was it different?—It was opposite.

Was it a case attended with very peculiar circumstances, in regard to evidence of a very conflicting nature?—The evidence was very long and very contradictory.

Did any difficult questions arise as to the admissibility of the evidence?—I have not present to me a sufficient recollection of that long trial to speak with absolute certainty. But I have no remembrance of any questions of difficulty in point of law occurring, nor was that expected. The difficulty was in the conflicting testimony on the point of fact, and for the jury.

Does any thing else occur to your Lordship in explanation, as to wherein you differ from the evidence which was given by Lord Cringletie?—No. There is one thing I wish to add, but it is not at all in contradiction. Lord Cringletie was asked, whether he thought it would be better that, in cases of difficulty and importance, it should be left to the Court to determine whether three Judges should attend, or whether it should be optional to the party to require two or more. It appears to me, it is not possible to leave it to the party to judge whether questions are of difficulty and importance; that I think must be left to the Court. If the power of demanding a trial at Bar be left to the parties, it must, I think, be left to them in all

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Lord *Mackenzie.*

cases. The rule may be adopted, that whenever both parties choose they may have a trial at Bar, or a rule may be adopted, that the choice of allowing a trial at Bar shall be left to the Court; but I do not think it possible to adopt an intermediate rule, that, in cases of difficulty and importance the choice may be given to the parties. If this mode of trial is to be limited to cases of difficulty and importance, I think the judgment of what cases are such, must necessarily be left to the Court.

From such experience as your Lordship has had in the Jury Court, do you think any alteration should be made in the present system of presiding over juries, by rendering the attendance of more than one Judge compulsory, or whether the regulation, as to presiding, should not remain as it is?—I cannot say I have formed any opinion, that the system could be improved by compulsory attendance. If there were any alteration in favour of compulsory attendance, I should be quite clearly in favour of limiting it to two. In cases of any difficulty, there is advantage in the presiding Judge having it in his power to consult with one of his brethren. I see no use in having a greater number in ordinary jury trials.

Your Lordship has no difficulty in being of opinion, that in an important case of life or death, tried in the Court of Justiciary, it is a great satisfaction to the Judge who is to try it, to have his colleagues sitting by him, to assist him with their advice or opinion?—I think that in cases of life and death in the Court of Justiciary, it is a great satisfaction to the presiding Judge to have other Judges, or at least one other Judge, to consult with. But I cannot say, that I think it is generally attended with much advantage, even in the Court of Justiciary, to have a numerous Court, or to have more than two Judges present at trials by jury; that, however, is matter of opinion, somewhat speculative perhaps.

Is there any remedy in the Jury Court for error which may be committed on any point which does not exist in the Court of Justiciary?—Certainly. Lord Cringletie mentioned the remedies in the Jury Court; but there is no remedy for error in the Court of Justiciary, except by a pardon in the case of condemnation. There is no remedy for error at all in the case of wrong acquittal. Reverting to what was said by Lord Cringletie, I think I ought to add a word or two in regard to the press of business of which his Lordship spoke. There certainly has been a press of business before the Lords Ordinary, particularly Lord Cringletie and myself, during this last year, from peculiar circumstances; but I do not expect this to continue in future.

Will the consequence of that be to enable you to devote the portion of time necessary for the attendance upon the Jury Court on Tuesdays, Thursdays, and Fridays?—I have no doubt of it. We have had a press of business much greater than usual, arising from the novelty of the proceedings under the great change introduced by the late Statute, from the old forms still continuing and mingling with the new, and from the non-appointment of two additional Lords Ordinary, who have recently been appointed. There is still a fourth cause, which is less worth noticing; but it did so happen, that the current of business, which never runs evenly, flowed that year more largely to the Second Division, of which we were Lords Ordinary. All these things combining, made a press of business before us which will not, I think, continue in future.

Do any further suggestions occur to your Lordship?—No.

His Lordship withdrew.

No. III.

John Russell, Esquire, Clerk to the Signet, and one of the Clerks to the Jury Court; called in, and Examined.

Mr. *Russell.*

AT the first Institution of the Jury Court, were the Issues directed and prepared by the Court of Session?—No, they were prepared at the beginning by the Clerk of the Jury Court, upon remits from the Court of Session; and after being so prepared by the Clerk of the Jury Court, they were reported by him to the Court of Session to be approved of there.

In the preparation of these Issues, did the Clerk of the Jury Court assist?—Yes.

Still were there prepared Issues directed by the Court of Session?—Yes. The Issues, when thus prepared and approved, were directed by the Court of Session to be tried by the Jury Court.

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Mr. *Russell.*

After the passing of the Act of the 59th of Geo. III. in the cases appropriated to the Jury Court, have the Issues been prepared in and by the Jury Court?—Yes.

How were the rolls for preparing the causes and Issues made up under that Act of the 59th Geo. III.?—In regard to the preparation of Issues, I can give little information, as it is not in my department.

Were the processes sent to the Register House?—Yes.

Were they sent from the Register House to the office of the Clerks of Issues?—Yes.

Was any roll made up in the Register House?—There was a roll made out of the causes remitted to the Court in which they were entered according to the date of their being received at the Register House.

Are you acquainted with the proceeding in the preparation of causes and adjustment of Issues since the passing of the Act of Parliament of 6th Geo. IV.?—In regard to the preparation of causes I am; for I officiate as one of the Clerks, until the causes are sent to what is called the preparation-roll. The mode in which causes come from the Court of Session is this: After a cause is remitted to the Jury Court, it is lodged in the Jury Court Office; the party who then wishes to get on with the case causes it to be enrolled in the hand-roll of one of the junior Judges of the Jury Court, who officiates as Lord Ordinary in the Outer House. The cause is called, and the order required by the party for defences, condescendences, and answers, or whatever it may be, is pronounced, and the cause proceeds before the Ordinary until it is prepared, and the Lord Ordinary remits it to the preparation roll; it is then transmitted to the Issue Chambers, and the Issues are there prepared by the Issue Clerks.

In cases that are not by Act of Parliament appropriated to the Jury Court, is the form of proceeding the same?—If the cause is remitted from the Court of Session, as it may be, and comes to the Court with the record closed and prepared, it is transmitted to the Issue Chambers; but if any order is required to be made by the Lords Ordinary, it is enrolled before one of them, and the necessary orders pronounced, until the case is in a state of preparation for the Issue.

Do you think that advantage will result in consequence of the new arrangements to be made, by the appointment of seven Lords Ordinary, and two junior Judges of the Jury Court, being able to give more attendance to it, and by consolidating the hand-roll and the preparation-roll, and there being only one roll for business?—I think there will be a decided advantage.

To what stage did the case proceed in what is called the Jury Court hand-roll?—Until the case was fully prepared and sent to the preparation-roll, that is, until the condescendences and answers before the Lord Ordinary were revised, and the pleas of law lodged, and the parties ready to close the record. Previous to that, however, applications were frequently made for the recovery of writings, and the examination of havers, all which went on before the Lord Ordinary in his hand-roll.

When the case came to the preparation-roll, what proceedings then took place?—I am not aware; for after it went to the preparation-roll, the proceeding went on before the Issue Clerks.

Does any thing occur to you with regard to consolidating the rolls, or is there any improvement which you think might take place in the mode of conducting the business, keeping in view the facilities which will be afforded by the new arrangement as to the room which is to adjoin the Court of Session?—I think it is of great importance that the hours of the Jury Court, and the attendance of the Judges, should be made certain, so that there shall be no delay from the Court not meeting; that the Court having to meet at a fixed hour, in order that the causes may always go on, there should be no interruption from the Judges' attendance in other Courts, which might prevent their attendance at the Jury Court.

Do you understand that that will be provided for by the new regulations?—So I understand.

Will it be an advantage, that instead of having separate rolls, the hand-roll and preparation-roll will be in one?—Yes.

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Mr *Russell.*

Do you think that the parties should still enrol their own causes as they do now, and not leave it to the clerks, as was done in 1819?—Certainly.

Then they would enrol them to come on before the Chief Commissioner, and the two Outer House junior Judges of the Jury Court?—Exactly in the same way as at present; and the mode by which they do it is by a notice lodged in the office, and in so far it is different from the Court of Session. The party lodges a notice, saying, "Take notice, this case is to be enrolled on such a day, for such a purpose," and then the purpose of enrolment is stated in the notice.

Do you think those acts that have been done by the single Jury Court Judges, acting separately in the Outer House of the Court of Session, could be equally well done by the united act of three Judges sitting on the Tuesdays, Thursdays, and Fridays, as is proposed?—Certainly.

Do you consider, in the present state of the Jury Court business, there would be ample time in the hours which you understand are to be regulated, namely, one o'clock on Tuesdays and Thursdays, and ten o'clock on Fridays, for doing what may be called the motion and preparation business, that was done before the Judges in the Outer House, as to motions, and before the Chief Commissioner acting in open Court, as to preparation?—Yes, I think there would be time enough in the present state of business.

Considering, that the average number of cases each day enrolled in the hand-roll are four, and the average number of cases disposed of in one day are six, and that the greatest number of cases enrolled in the hand-roll in any one day, during the Session, are fourteen; do you see any impediment, according to the course of proceeding which is proposed, on the days and hours that have been mentioned, in the Jury Court in its united capacity, getting through that business by taking up after avizandum, the different cases in any order that may be proposed?—No, I think they would be able to do the whole business.

You do not suppose that any part of this proceeding would add to the expense?—No, I think not, but the contrary.

Do you think it would prevent the delays of adjournment that necessarily take place?—I think it would.

Have you been clerk of the Jury Court, attending trials from the very commencement of it?—I have.

Of course, having taken your fair turn, you have attended a great number of trials?—I have attended one half of them at least, if not more.

Have you had an opportunity of observing, therefore, the manner in which Juries have conducted themselves, both in Town and on the Circuits?—Yes.

Will you state what impression has been made on your mind with regard to the rectitude, and capacity, and attention of Juries?—I think in every respect the Jurors have discharged their duty in the best possible way. I have not seen a case where I could say there was any thing objectionable on the part of the Jurors.

Has any difficulty ever arisen on the score of the unanimity required in their agreeing in their verdicts, or has the time given them for deliberation ever been nearly exhausted?—No, it has never been nearly exhausted, as far as my recollection goes. I do not think any Jury has ever been inclosed above two or three hours at the most.

With regard to that part of the institution, have you any doubt that it is in a state perfectly fit for uniting the trial by Jury in Civil Causes, with the jurisdiction of the Court of Session?—So far as regards the Juries certainly it is.

Have you had occasion to observe the modes of proceeding before one Judge, and before more Judges than one?—Yes.

You know that the course of the Court at present is that one Judge may preside alone, and that more than one may come voluntarily, but are not called on compulsorily to come, but that upon the application of parties, in cases of magnitude and difficulty, the Court have it in their discretion to order a trial before a Court, not consisting of less than three?—Yes.

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Mr. *Russell.*

Supposing a new regulation to be made requiring the Condescendences and Answers in Jury Court cases to be printed with margins, does it occur to you that there is any other arrangement better calculated for attaining facilities in the amendments of Condescendences and Answers, and in the more ready observation of the execution of the amendments ordered, than that which has been suggested?—I think that would be a very great improvement, instead of having them on separate papers, as at present.

Would considerable facility arise from having the Condescendences and Answers printed even with reference to trial alone?—Yes.

Does any other suggestion occur to you in the way of amendment of the present system?—No, nothing at present occurs to me.

The witness withdrew.

No. IV.

Joseph Murray, Esquire, Advocate, one of the Clerks of Issues in the Jury Court; called in, and Examined.

Mr. *Murray.*

DOES your duty begin after the cases have been prepared to a certain extent, and sent to what is called the Preparation Roll?—Yes, it does.

Is your duty to assist in preparing the Issues?—It is.

Is the first step you take to send a notice to the Agent of the parties to attend the Clerk of the Issues?—Generally the notice is for the Counsel and Agents of the parties to attend at the Issue Chambers to prepare Issues.

If they themselves have Issues prepared, are they directed to bring them along with them?—Yes, that is added to the notice.

Before this notice is sent, in order that you may be ready to prepare Issues, do the Clerks of Issues make themselves masters of the process to which the notice relates?—Yes.

In the case of so making yourself master of the process, if any nice question seems likely to arise, do you, in settling the issue, confer with the Lord Chief Commissioner, the better to enable you to hold communication with the Counsel and Agents on the scheme of the Issues proper for trial?—Constantly.

Are the Drafts of Issues made out in consequence of personal communication and conference between yourself and the Counsel, and Agents of the parties?—They are; perhaps I should explain, that Mr. Clerk, the first Clerk of Issues and myself meet the parties together; we both have made ourselves masters so far as we can of the process; the chief part of the proceeding is with Mr. Clerk, I giving what assistance I am able.

You are perfectly conversant with the mode of proceeding?—Certainly; I have been present at all the Issues which have been prepared since I was appointed.

Is the correctness of the summons and defences, of the condescendences and answers, and notes of pleas in law, ascertained by considering them along with the Scrolls of Issues?—Always, and any defects that may occur, either to Mr. Clerk or myself, are pointed out to the Counsel, and the subject is discussed with them as fully as we can.

Is the record not closed till after you have had that conference?—It is not.

After the case is thus brought into a state of preparation, and you have made out the Scroll of the Issues, are they submitted to the consideration of the Lord Chief Commissioner?—They are; and in some cases before the draft of the Issues is made out, the subject is discussed with his Lordship, by Mr. Clerk and myself; after this discussion we make out what appears to be the proper Issue, the parties get copies of that, and it is afterwards discussed by them before the Lord Chief Commissioner, if they have any objection to the Scroll so made out.

If the Lord Chief Commissioner finds no alteration to be necessary, does he return the process and drafts with a mark, signifying that the Issues are proper for the trial of the cause?—He does generally within one or two days; but in cases of difficulty frequently not so soon.

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Mr. *Murray*.

Will you have the goodness to state, whether, when they appear to his Lordship to require correction, and that the correction is no more than the change of an expression, he puts such corrections on the margin of the draft?—He does, in pencil generally.

If the corrections are of more importance, does he put them upon a separate paper, often adding reasons for his alterations?—Frequently.

When the process and drafts of Issues, and notes of alterations are returned to the Issue Clerks, and the subject requires it, does the Lord Chief Commissioner confer fully with the Clerks on the principle, the frame, and expression of the Issues, for the double purpose of settling the Issue best calculated to try the particular cause, and of advancing the general improvement of the system?—He uniformly does so, in every respect, and for every purpose that has been mentioned.

When by these means the Issues proper for the trial of the cause are brought into such a shape as to be fit for the consideration of the Counsel, is a notice sent to the Agents to attend the Lord Chief Commissioner at his Chambers in the Jury Court, with Counsel on both sides, in order finally to adjust them?—It is, I believe, in the same notice the parties are informed that the record will then closed.

Are these discussions with the Counsel in framing Issues in the nature of a mutual debate, or of conversation and mutual explanation?—By conversation and mutual explanation constantly.

Do you consider that that mode is better adapted to bring out a proper Issue than a public discussion in open Court at the Bar?—Much better, at least in this stage of preparation.

When the Issues are so adjusted, does the Chief Commissioner endorse them on the back, as the Issues finally adjusted for trial?—When they are so adjusted, a note is made out, stating these are the Issues proper for trying the cause, which his Lordship signs; and after they are engrossed upon parchment, his Lordship again signs and dates them.

In regard to these different meetings with the Council, which you have mentioned as taking place previous to the final fixing of the Issues, are you aware how the expenses are charged against the parties, or whether fees to Counsel are allowed and sanctioned by the Jury Court?—They have been invariably sanctioned, so far as I have any knowledge on the subject, but it does not fall within my personal knowledge farther than being in Court at the time the accounts are adjusted.

Does it strike you that the expenses so occasioned are more than what would be incurred by a public debate in the Court?—Certainly not, so far as I know, but I have not examined them.

It does not occur to you, does it, that additional expense is occasioned by this mode?—No, it does not.

Is it considered a substitute for a hearing at the Bar?—It appears so to me.

Does the Issue, thus certified, lie over for ten days, in obedience to the 34th section of the statute, which gives the parties that period to propose alterations?—It does.

Does it ever happen that parties consent to have the Issues engrossed and signed without waiting till the lapse of these ten days?—That has occurred in a few cases; I am not aware of the number.

After the Issue is engrossed, is a day fixed for reading the engrossment in open Court, of which the parties have notice, that they may appear in Court to apply for alterations, until the reading is closed?—In general, at the time the Issues are completed, the parties are informed that unless they apply for an alteration of them within ten days, they will then be engrossed, read in Court, and signed.

Is the Issue then transferred to the Jury Court Office in the Register House with the process, there to be ready for notice of trial?—It is.

You said the Chief Commissioner goes over these Issues for the purpose not only of bringing out the question in the particular cause, but also with a view to the general advancement of the system; would you have the goodness to explain what you mean by the general advancement of the system?—My meaning is, that it is for the purpose of getting at the General Issue in the particular class of cases to which the cause belongs, and also for communicating to Counsel, and those engaged in the cause,

cause, what ought to be an Issue in that particular class of cases; with both views I consider it useful.

Since the passing of the Act of the 6th Geo. IV. have the parties given obedience to its instructions by the previous tendering of Issues?—In several cases they have, but not in all.

Have those Issues so tendered been the subject of discussion afterwards before the Lord Chief Commissioner?—In general not; in general the parties were satisfied, at meeting Mr. Clerk and myself, that the Issues proposed by us were preferable to those which they tendered; and in that way I am not sure if they ever came before his Lordship, except that they are tied up with the papers; and whether they were considered by his Lordship, I really am not capable of answering.

Were they generally prepared in such a state as you did not think fit for trying the cause?—Generally they were, but there have been one or two instances in which the Issue given in by the party, was the Issue approved of by the Court.

Do you think, that though the majority of these Issues are not very well prepared, yet that they are *bonâ fide* prepared; or are they only given in as points of form to evade the Act of Parliament?—I do not think they are ever given in as points of of form.

Do you think they are the best Issues that have occurred to the parties themselves?—I suppose so; in several instances I may also mention, that instead of their being given in the form in which other papers are given in to the Court, a Counsel occasionally produces a slip of paper from his pocket, with a few lines written upon it, which he states to be the Issue the party wishes to be adopted.

Do you think it would be an advantage if means can be found to compel parties to attend upon the examination of cases, and the amendments of condescendences, and answers, and so on, so as to prevent delay and expense arising from non-attendance?—Certainly it would, if attendance could be enforced in the same way as in Court; it would prevent the expense which must be occasioned by one party coming at one time, and returning in consequence of the non-attendance of the other.

Has any means occurred to you, by which that attendance could be compelled or enforced?—I cannot say I know of any, except such as are obvious.

Can you state whether any means of compelling parties to attend upon the examination of cases, and of the condescendences and answers, and so on, could be adopted so as to prevent the expense and delay which are occasioned by irregularity of attendance?—I should find it very difficult to suggest any compulsitor for that, unless by imposing fines on the party; it appears to be exactly in the same situation as Counsel attending the Lord Ordinary or the Court, and the same means which would enforce attendance in the one case, might be employed to enforce it in the other.

Has there been any discussion before more Judges of the Jury Court than the Lord Chief Commissioner, in regard to the settlement of any Issues since the statute of Geo. IV?—I am not prepared at this moment to answer that question. I think I have the means of giving the Commissioners information; I do not recollect the Issues that have been settled since the passing of that Act, so as to be able to speak to them.

The question refers to these Issues, regarding which dissatisfaction has been expressed by the parties in the settlement of them?—I know that frequently discussions have taken place before his Lordship and other Judges in the preparation of Issues, but whether they have been since the passing of the last statute, I am uncertain.

In general, in difficult and important cases, do communications take place between the Lord Chief Commissioner and the other Judges, in the preparation of Issues before they are finally adjusted?—Yes, certainly, if the parties in any case express a wish for the opinion of other Judges on the subject, his Lordship is most anxious in all cases of difficulty, to have such meeting and discussion; the only difficulty which I have heard him frequently regret, was the impossibility of getting other Judges to attend, from the quantity of other business which occupies their time and attention.

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Have you had frequent opportunities of attending to the actual trial of causes in Court, by Juries, since you were appointed Jury Clerk?—Yes, I have; and I believe with a very few exceptions, I have been present at all the trials in Edinburgh, and several upon the Circuit.

Does it appear to you, that the conduct of the Juries in the discharge of their duties, has been distinguished by intelligence, attention, and integrity?— In every respect.

Has any difficulty arisen in the trial by Jury, from the misbehaviour of Jurors, or from the conduct of that part of the tribunal?—None that I know of.

Has any great inconvenience arisen from the regulation of unanimity being required of the Jurors?—None that I know of.

Have you had occasion to attend to the conduct of causes in the Jury Court, with a view to any publication of its decisions?—Yes.

Will you name that publication?—" Reports of Cases in the Jury Court," which have been published in three volumes.

Prior to passing the Act of 1819, was the framing of Issues conducted upon the plan of Issues of specific fact?—It was; but at that time I had no opportunity of attending the preparation of Issues: I only knew of them after they were prepared, and brought forward for trial.

After passing of the Act of the 59th Geo. III. in those cases which were appropriated, and those remitted entire to the Jury Court under that Statute, did the framing of Issues continue on the same system, namely, Issues of specific fact? —I believe in several cases it did, but the tendency certainly was to try to bring the parties to agree to have more general Issues than had been in use before.

Did that take place more frequently after Lord Fife's case in the House of Lords? —It did.

With regard to actions of assault, in cases of justification, do you consider the general Issue, or the frame of Issues and justification, sufficiently settled, particularly in cases of assault, by or upon Officers in the discharge of a public duty?— In the case of a common assault, I think the Issue in chief is settled.

Do you consider that it is so settled, as now to be applicable to all such cases?— Yes, I think it is not at all difficult, to draw a General Issue for an assault, if the condescendence states sufficient facts.

Do you think it is now pretty well settled?—Yes.

What is the form of the Issue for such cases?—Whether A. B. did, on such a day, and in such a place, assault and strike C. D.

In regard particularly to assault by or upon officers in the discharge of a public duty, do you consider that the frame of a General Issue has been pretty well settled in such cases, or have you had many such cases?—Not many. If that is to be varied from a case of mere assault; if it is to be qualified by the situation in which the officer stands, as if it were in the discharge of his duty, I am not sure if the General Issue in that case is so thoroughly settled; I should feel more difficulty in saying what the Issue should be, in circumstances which might be supposed, but the chief difficulty is in the Issue in defence or justification.

Do you consider that the form of the Issue, to bring out a justification, in cases of assault, is pretty well established?—When the case is simple; but in some cases, even of assault, it may be difficult to say if the justification should appear in the Issue or not, or whether facts stated by a defender amount to a justification, or merely to an alleviation.

Is that considered to be one of the most difficult points in preparing such cases? —It seems so to me, in respect that the justification may be of various descriptions, and that it is difficult to say what is justification, and what alleviation.

In actions of reduction on the head of furiosity and idiotcy, facility and lesion, force and fear, and where the deed has not been executed according to the solemnities of the statutes, where the deed has been obtained by fraud, or by forgery, do you consider the frame of the General Issue to be pretty well established?—I conceive

ceive that was settled in a case decided by the Lord Chancellor on that subject: I allude to Lord Fife's case; the Issue was, whether the deed was not the deed of the party.

Can you specify any other actions, besides those of assaults and reduction, in which the General Issue seems now to be pretty well established?—There is rather more difficulty in answering a general question of that nature. I think in cases of breach of agreement or promise, it may be said to be pretty well established; at the same time, in complicated questions, we might find it somewhat difficult to satisfy the party that the Issue we thought the proper one was the Issue to try the cause.

In the action of reduction, the General Issue established is fixed in specific terms, to be whether it is not the deed of the granter. When an action of reduction comes before the Jury Court, and it appears to be an action of reduction founded upon one head, or upon several, is there any difficulty in applying that General Issue to it as a technical or General Issue?—None, that I am aware of.

Bearing that in mind, will you answer the question as to whether the General Issue is so established in other general cases?—Perhaps with that in view, I should say that I am not aware of the General Issue being established in any other case, even for a breach of agreement or promise. I do not think there is any technical expression yet found, which includes all cases of breach of contract, but the contrary.

Do you think it would be desirable to have a General Issue for Reductions under the head of death-bed, instead of having recourse to Issues on the points in the cause?—I do not think in a case of death-bed, that the General Issue, "Whether it is not the deed of the party will try the question?" In death-bed the deed is the deed of the granter in one sense, and it is only one party who is entitled to question it. The General Issue, whether it is his deed, will not try the cause; it must be a General Issue on the point in the cause, "Whether he was on death-bed or not?"

Has any such General Issue, in regard to deeds supposed to be executed in death-bed, yet been digested and fixed?—I am not aware of any such.

Although none such has been carried into effect, has any such General Issue come under your consideration from the Judges?—The subject has been under consideration, and certainly we have had several discussions on the subject with the Lord Chief Commissioner; but I do not recollect a case at the present moment.

Is any precise formal Issue fixed?—I am not aware that any one is fixed; I do not recollect it.

Do you recollect any case of an action of reduction on the head of death-bed having occurred?—Yes, several.

You do not recollect the form of the Issues in any of these cases?—No case has occurred that I recollect since the decision in Lord Fife's case.

Do you consider, that, in questions of maritime insurance, or of insurance against fire and on lives, there has been any advance made towards the use of the General Issue?—There certainly has been an advance made to it.

Has there been any opportunity of applying the General Issue to actions on charter-parties, for wages of master and mariners, responsibility of ship-owners and masters, carriers by land and water, innkeepers, stablers, and so on?—I am not aware of any such case having come before us.

Has advances been made in actions for nuisances, on patents, wrongous imprisonment, damages for adultery, seduction, breach of promise of marriage, and rights of public roads, to the use of the General Issue?—In some of these classes of cases there has. In others I do not think any case has occurred. With respect to cases upon patents, I do not think it is fixed in the same manner as the other General Issues I have mentioned.

In a case of Morton v. Barclay, which was an action for the infringement of a patent, the Issue was, whether on or about the 20th day of October 1821, and subsequent to the date of the said letters patent, and of the said enrolment of the specification, the defenders by themselves or others, carrying on business as ship-

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wrights in Glasgow, under the firm of the Stobcross Ship-wright Company, did, without the consent or permission of the pursuer, and in contravention of the privilege granted and protected by the said letters patent, erect machinery at or near Stobcross near Glasgow, in imitation of and which was substantially and in effect the same with the machinery described in the said specification, to the loss and damage of the said pursuer; would the Issue which has been read be adopted in the case of infringement of patent, in the same manner as the Issue in a case of reduction?—I think it would, perhaps, with a verbal alteration or two. I do not conceive that even that Issue is so fixed, as the Issue of "Whether a deed is not the deed of the party?" It is not the precise wording that might be adopted in a subsequent case; it has not come under the same discussion, or stood the same test, as Issues in cases of reduction.

Have you had several cases of actions for written libel before you?—A good many.

Do you think, that, in cases of written libel, the Issues could not be much improved by a more minute insertion of innuendoes, where there is a doubt in regard to who or what is meant?—In some cases, undoubtedly, they might.

And in other cases, could not the Issues be much improved by avoiding innuendoes, where it is clear, who or what is meant in the face of the libel itself?—Certainly, and I may mention, that we have been endeavouring, as far as possible, lately, to correct the errors under the former practice.

In the trial of actions for written libels, are you aware, that much difficulty has arisen by the application of the *compensatio injuriarum*, according to the established rules of the law of Scotland?—There is one case in which very great difficulty, and very great expense to parties was occasioned by that rule of the Scotch law; it was the case of Edwards *v.* M'Intosh.

Do you conceive it would be an advantage in such cases, that the principal action should be sisted until the counter action is brought, so that the two actions might be tried together?—I have some doubt if that would correct the difficulty.

Have you known several instances, in other actions than those referred to, in which cases of the same nature have been, not conjoined, but brought together to be tried at the same time, or the one immediately after the other?—Certainly, and with great advantage; but in some cases we have also experienced great difficulty from actions being conjoined, which we thought would have been much better dealt with if they had been kept separate. It is from feeling that difficulty, in the preparation of Issues, and seeing the inconvenience experienced by Judges in the trial of causes so conjoined, that makes me doubt, if conjoining the two actions, is the best way of getting clear of the difficulty in the case of *compensatio injuriarum.*

Suppose an action to be brought for libel, and that the party who defends in that action has compensation, would it be better if he were allowed to put in his compensation as a defence to the action, or to be put in a situation to bring a separate action for the compensation, and then to have those two causes placed together for trial, so that they should be tried in the same day, and the damages in one should constitute a demand or set off against the other; would that be a cure for the difficulties that have arisen from the application of *compensatio injuriarum*?—At first sight that appears to be a cure for the difficulty; but there is a difficulty connected with that mode of proceeding also, which is this: I do not know if there is any compulsitor on the parties to place the causes in this manner together, and to have them tried at the same time and by the same jury. Therefore, as I stated before, probably, the one way would be, to let each party bring and try his action, and make what arrangement he can for trying them together.

But if there were a compulsitor to make them try the two causes together, would not that be an advantageous arrangement for that species of trial?—Yes.

There being two Issues, would there be any inconvenience in trying them at one time?—I am not aware that there would be any inconvenience. In a great proportion of cases I should think it would be advantageous to bring them together; butthere may be cases in which it would be the reverse.

Is there any more difficulty in keeping sight of the subject of compensation as a defence in trying the two actions together, in framing the Issues, and in getting a satisfacto ry

a satisfactory verdict to the two parties, than in trying any other action in which there is a specific defence against it?—No. I am not sure that there is; the only difficulty is to ascertain if the compensatory matter is of such a nature as ought to be stated against the demand in chief.

In actions for words spoken, or for verbal injuries, which are maintainable under the law of Scotland, to a great extent, has it been the recent practice, in preparing Issues, to require specific averments of the times when, the places where, and the parties to whom the words were spoken?—It has; and perhaps I should say that Mr. Clerk and myself have pushed that rather farther than we have since been found entitled to do. A majority of the Court have been of opinion that we attempted to fix the parties too specifically down to time and place.

Does your own experience enable you to say whether this particularity of specification which has been thought necessary for the safety of defenders worked injuries to pursuers?—I am not aware of any case where it in the least appears to have wrought injustice to the pursuers. I think it right to add, in reference to questions formerly put, that unless the condescendences and answers are very much improved, or perhaps altered entirely in their nature and structure, I consider the General Issue to be dangerous in many cases.

In what respect would you alter them; would it be by making them more specific and less argumentative?—That is one respect in which they would require considerable alteration; another is, it appears to me, that a great proportion of the condescendences at present aver evidence instead of averring fact; they go into the detail of the case, without stating the propositions on which the case stands.

Is there any other alteration that you think should be attended to?—Greater accuracy in the averment and the form of expression; often, instead of the essence of the case being in the form of an averment, a detail of circumstances is given, and a sort of averment is made at the end, that, "from this your Lordship must hold so and so to be the fact." Instead of averring what the fact is, and that it is to be proved by certain circumstances, they detail the circumstances, and say, "from these it must be held that the fact is so and so."

Will you have the goodness to state, whether there is any improvement which you can suggest for the more particular application of the averments in the condescendences to the pleas in points of law, stated in the notes of pleas?—The only suggestion I can give is, that the attention of the Counsel should be constantly drawn to the subject, that the averments should bear directly on those pleas in law; for the pleas in law are the main point to which the averment should refer.

Do you think it would create great facility in the preparation of Issues, and also bring the condescendences and answers to greater improvement and maturity, if they were printed, so as to come more directly under the eye of all parties concerned?—It would be a great relief, and bring them much more into view, if they were printed. I know there have been objections made to printing more than what was absolutely necessary; but I conceive that condescendences and answers are the most important papers in the cause, and it would lead to their being framed with more accuracy and precision.

Do you think it would be a great advantage if the condescendences and answers were printed with broad margins, so that the amendments of each might be put opposite to the article to which the amendment referred?—I certainly think it would be a very great improvement. At present, it appears to me, a revised condescendence is a worse paper than the original one, from the corrrections not appearing in the same paper near to the place where it is required in the condescendence.

If sufficient precision can be brought about in condescendences and answers, and notes of pleas in law, are you of opinion the cases would be relieved from unnecessary matter, the causes be more correctly understood, and surprise avoided upon the trial?—Undoubtedly.

Will you have the goodness to state whether the admissions, being settled, as is now the practice in the Jury Court in preparing Issues, and engrossed with the Issues, will not greatly facilitate trials, save parties from being turned round on proofs of mere form, and, by reducing the evidence to the pure merits of the cause, save much testimony, and consequently time and expense?—It appears to me undoubtedly they will.

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At present are not Counsel or Agents of parties required to bring Issues with them, if they intend to propose Issues?—Yes, they are.

Will you state, whether, according to your experience, you consider it to be advisable, in the present state of issues, that the delivery of Issues by the parties proper to try the cause, should stand upon the footing on which it does under the present regulation, or whether a more peremptory order should be made for their delivery?—I am not aware of any improvement that it would be to make it more peremptory. The parties have it put fully in view that, if they intend to propose them, there is full opportunity for doing so, and of late there have been more delivered in that way than at first.

Do you not think it would be an improvement to make it absolutely compulsory that the parties should try their hands in preparing Issues, and that it should be a part of the duty of the profession, and thereby to lessen the labour of the Issue Clerks?—Perhaps it might be an improvement; it would make the subject more generally understood. The only difficulty we have found from Issues being given in by the parties is one which has been, I believe, experienced from an early period in the Institution; that, when a party brings his own issue, he is anxious to defend that for some time, and is not so ready to admit that another is better. It is in human nature, that a person having done anything himself, is not so willing to be satisfied he is wrong.

If the practice were more generally followed, would a facility of preparing them be acquired?—Certainly.

Would it not be a more effectual compulsitor to say, that if the pursuer do not, in compliance with the Statute, produce his Issue, judgment shall go against him, from which he shall only be reponed by paying the whole expenses?—That would be a much stronger compulsitor.

Has there been any case in which an Issue so tendered has been approved of by the Court?—There is one or two; perhaps there may be more. I cannot name the case. I know there was one not long ago, in which the Issue, with a mere verbal alteration, was adopted, and was preferred to the note of the Issue which I had drawn out. I submitted it to Mr. Clerk, and the Issue of the party was adopted.

Will you have the goodness to state, whether from your experience in the consideration of condescendences and answers, and in making out Issues, if it were imperative on the parties to prepare Issues, it would not improve also the condescendences and answers in the hands of those professional men?—Undoubtedly that is my opinion.

How do you think it would tend to improve them?—The Issues appear to me to be the substance and essence of the cause; and having that constantly in view, must be of great consequence in drawing condescendences and answers, (and it is what the Counsel should have in view in drawing them.) When the General Issue is fixed in a number of cases, I conceive the condescendences and answers should be something approaching to what the Issues formerly were in the Jury Court, only substituting an averment and denial for the question.

Do you mean that they should aver specific facts?—Yes, certainly.

In drawing an Issue, do you not consider first of all the specific fact that is averred by the party, and the denial of it; then do you not consider the general averment arising out of that specific fact, and the denial of that; and is not the form of these Issues merely putting that denial either specifically or generally, in the shape of a question?—Certainly, I conceive that to be the object we always have in view.

If a number of specific facts are averred by the pursuer and denied by the defender, if these specific facts can be reduced to a general question, (the opposite party having full notice of the specific facts) would that, with reference to the condescendences, be a safe General Issue, provided the case were of a nature to admit of a General Issue?—I conceive that it would.

Would not that apply equally to a case where the defender is in the situation to aver a variety of specific matter, (in order to constitute his defence by avoiding the demand) as to the case of a pursuer—I conceive him to be in the same situation as the pursuer.

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Have Issues of specific fact given way, or begun to give way to general questions put on the point of the cause; and is there a tendency to reduce the Issues on points of the cause to General Issues?—There certainly is a much greater tendency to that of late than formerly.

Notwithstanding this tendency, is it, according to your experience of that mode, advisable that the Issues should be adjusted by their continuing at present to undergo the discussion and examination which has hitherto prevailed in the preparation of Issues in the Jury Court?—At present I should conceive it absolutely necessary from any experience that I have had.

Do you consider that there will be considerable improvement from the knowledge which practitioners will acquire as to the mode of framing Issues?—Yes.

Do you find no disinclination to the General Issue?—None whatever. I would say, that in several instances I thought there was too great an anxiety for it, and even the Counsel, (I speak with deference of men of such ability) I have in some instances seen apply to have a General Issue, when I do not think they were in the least aware of what the General Issue in the case would be.

Do you think all that is necessary to render the introduction of the General Issue complete, is practice and experience?—Certainly, and great improvement in the condescendences and answers.

Is there any rule or principle to govern the formation of Issues where the General Issue is not applicable, or does not exhaust the cause?—I am not aware of any such rule. It appears to me that the general point in the cause must be drawn from the facts that are stated.

Is there any rule or principle to govern the formation of Issues where the record establishes double or inconsistent pleas?—There is no such rule that I am aware of; and it is extremely difficult for us to know what to do with a case where there appears to be inconsistent pleas.

Has any plan been suggested for introducing into the summons various allegations, stating the same demand in different ways, like different counts in an English declaration?—In private, and in conversation, I have heard the thing several times mentioned; but I am not aware of any proposal of that sort that has been brought forward for public discussion or adoption.

Are you aware of the provision of the Act of Parliament which says, that the pursuer of the Issue "*shall*" deliver to the Clerk of the Jury Court an Issue or Issues in the case which he conceives may be proper for trial, prepared and signed by Counsel, and the defender *may* lodge such Issue?—I am aware of it.

Are you aware of the difference of expression in that provision?—I did not recollect it until it was pointed out.

Is the first part of the provision, that the pursuer *shall* deliver an Issue, strictly enforced?—It is not.

How would you enforce it?—As to that I really cannot say that I am prepared to give an answer. I do not recollect any compulsitor that is mentioned in the Act, by which he is to be made to do it.

How comes it, that it has not been peremptorily required, that the pursuer should in every case deliver in his Issue?—It was after much deliberation and consultation by the Court, (I cannot state by which of the Judges, but I know it was), repeatedly discussed and considered by the Lord Chief Commissioner, Mr. Clerk, and myself, and I believe some of the other Judges, whether it would be most advisable to enforce that regulation, or to put it in the power of parties to comply with it. The result of it was, the notice, as it at present exists, of a direction to the pursuer, if he intends to propose Issues, to bring them with him.

Would there be any difficulty, in reference to the 34th section of the Act, for the Jury Court to declare it to be a standing order, that no step should be taken in the preparation of an Issue in each particular case, unless the pursuer complied with the Act of Parliament?—I do not conceive there would be any difficulty in the Court coming to such a resolution, at least I am not aware of any, but there would be great inconvenience to the parties, and to those connected with the Court, particularly to Mr. Clerk and myself. It is no easy matter to make one's self acquainted with

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with some of these processes, and to keep them in mind, so as to be able to meet the parties. If the case stand over, the whole of the labour is to be gone through again. The parties must come back, and double the expense be occasioned, that would have been incurred, if the Issue had been formed at the first meeting.

But would not the pursuer in the action be the person who would principally suffer by reason of his cause standing still?—In that respect he would suffer certainly.

Why should the Clerk study the case until the Issues are given in?—If that regulation were to be adopted, compelling parties to put in Issues, certainly there would be no occasion for us to consider the case till after the Issue was lodged.

Is it your opinion, that if the parties lodge their Issues, it would tend greatly to improve the system?—It would tend to diffuse a knowledge of what an Issue ought to be among the practitioners; I think it would tend to draw the attention of Counsel to condescendences, which I conceive to be what is wanted, in order to their being framed with more precision and accuracy.

Do you think the enforcement of that part of the Act of Parliament, would be an expedient measure?—My opinion is not decided as to whether it would be expedient to enforce it: I rather think it would not, in the present state of matters.

You have said, that it would tend to the improvement of the profession in the framing of Issues, if the parties were called upon to frame their own Issues; for it would give them practice in the consideration of Issues; would there be any difficulty in requiring that the pursuer, at the time the process was lodged in the Jury Court Issue Office, without waiting for the notice to attend, should be compelled to lodge his scheme of Issues?—I see no objection to that; but my impression is at present, it would lead to the giving in of formal Issues, without attending to what was the real Issue in the cause; but I may be quite wrong in this opinion.

Suppose the Issue to be delivered in at the same time the process is lodged, would not that relieve the parties from the necessity of an adjournment?—Certainly.

Do you think that that mode of proceeding would tend to improve the profession in the preparation of Issues?—I rather think it would. I may mention that that time and mode of doing it has not been suggested to me until now.

Keeping in view that the Act of Parliament provides, that the pursuer shall deliver to the clerk of the Jury Court the Issue or Issues in the case, which he may conceive to be proper for trial, prepared and signed by Counsel, if the practice should be followed of giving in merely formal Issues under that clause of the statute, would it not be perfectly easy for the Judges of the Jury Court to declare, that no part of the expenses for preparing such formal Issues should be ever charged against the client of the Counsel or the Agent; and would not that check the practice of giving in merely formal Issues?—I certainly think it would.

Might not the Court, in such a case, inflict in open Court censure on the Counsel for such a proceeding, and award the expenses attending it to the other party?—Certainly.

Can you suggest any other or better mode of giving effect to this section of the Act of Parliament?—I am not prepared to make any such suggestion. When the subject is more studied by the profession, I have little doubt that the Issue should form part of the Condescendence; but I still doubt, whether much good would follow at present from compelling parties to give them in. It appears to me, that the greatest improvement would probably result from using every effort to improve the Condescendences and Answers, and allowing those who have been in the practice of drawing Issues, gradually to extract from these improved papers what might ultimately form a system of General Issues, which would then be with comparative ease applied to all cases that might occur.

Do you conceive it to be necessary that in all matters of defences and justification, the circumstances should be stated with the same particularity as in the original action?—Certainly.

In the case of the defence *veritas convitii*, do you think the place, person, and circumstances, should be stated with the same particularity of averment as in the original action?—Yes.

In

In those actions to which the General Issue is not applicable, and consequently no precise form of expression of the Issue can be settled, (as in the case of the General Issue,) must not the special Issue in all such actions be derived from the nature of the actions, and the averments and denials obtained from the parties, taking care to put a general question, and not one of a specific fact?—Certainly, that is the object we have in view in framing Issues in such cases.

Can you say, whether correct and satisfactory trials have not taken place, avoiding Issues of specific fact, and directing Issues in the nature of general questions?—Certainly, I conceive the trials have been perfectly satisfactory upon the General Issues.

Will you have the goodness to state, whether, when the use of the General Issue shall be sufficiently extended, and the forms applicable to each action be correctly settled, (as they are now in all cases of reduction,) the labour of the Judge superintending preparation would not be greatly facilitated, and also that of any reviewing tribunal?—I certainly think it would. I conceive that when the averments are properly made, the framing of General Issues will be a very easy matter, in a great many cases. There will be some cases in which it may be difficult to know under which General Issue the case ought to come. But when the averments in Condescendences and Answers are properly framed, the preparation of the Issue will, in general, be very easy.

Have any Issues been prepared under the superintendence of Lords Cringletie and Mackenzie?—There have, lately, while the Lord Chief Commissioner was indisposed.

Do you consider those Issues have been adjusted under their superintendence to the satisfaction of the parties?—I believe, entirely so. There were very few cases so adjusted and settled.

Did the Judges understand the adjustment of the Issues accurately?—In these cases, generally speaking, the Judges understood the adjustment of the Issues accurately.

Will you have the goodness to state whether you think the following out the course of preparation as practised, and as proposed to be improved, would, with certainty and sufficient celerity, bring the system into that state, that all those acts of preparation, from the Summons to the Issue, could be gradually transferred to the care of the profession, and cease to be the constant subject of personal interview?—I think that at some future time the acts of preparation may and ought gradually to be transferred to the profession. What that time may be depends very much on the degree of attention bestowed on the subject. I am not sure what the improvement is which is referred to in the question.

Supposing any method were adopted by which Condescendences and Answers were brought to be more specific by printing them, and causing them to undergo discussion in the Outer House before the three Judges, as you see now going on under the new Act of Sederunt, and by forcing the parties to give in their own Issues, and extending the system, are you of opinion that it may be brought to such a state as, that although there must be still superintendence, you may almost trust it to the profession itself, without the assistance of the Issue Clerks?—My own opinion is, that it ultimately ought to be brought to such a state, that the party should be answerable, and suffer if he did not himself propose his case in a proper manner, but at what time that may be the case, I cannot say.

Has any means of facilitating and securing this object, (that is, of extending the system to such a degree that it may be trusted in the hands of the profession at large,) occurred to you beyond what has been suggested in the interrogatories?—The Commissioners alluded a little while ago to a matter which was not asked of me in the interrogatories, and upon this general question I would say that what would facilitate it very much, would be by an additional Judge or Judges giving their *undivided* attention to the Condescendences and Answers, and perhaps to that business alone.

Do you keep in view the alterations provided for by the late Act of Sederunt as to the attendance of the two junior Ordinaries of the Jury Court in the Outer House, along with the Lord Chief Commissioner?—I have not that in view.

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Mr. *Murray*.

If that is effectually provided for, will it not afford a facility in doing that to which you have alluded, taking into consideration the number of cases on the Roll for consideration at one time, which are not above four or five in a day?—That will tend very much to facilitate the business.

What do you mean by saying, that you think there should be another Judge?—I mean a Judge sitting along with the Lord Chief Commissioner.

Considering that, by the Act of Sederunt, it is proposed, that upon the Tuesdays, Thursdays, and Fridays, at certain fixed hours, Lord Cringletie and Lord Mackenzie shall sit with the Lord Chief Commissioner in the Jury Court in the Outer House, and that the places for preparation are now adjacent to the Court of Session; that all acts of preparation, whether before the Issue Clerks, or under the superintendence of the Judges, will be done in that vicinity; that the consequence of all this will be, that there will be none of those adjournments which are necessarily made from the non-attendance of Counsel; but that those Judges may compel them to attend as any other Lords Ordinary may do, considering, that it is proposed these two Judges should take their equal share with the Lord Chief Commissioner in the consideration of the cases that come for preparation, commencing the preparation from the summons, and continuing it down to the final settlement of the Issue, and signing it when engrossed in all its stages; and that the same plan which has been followed in respect to the preparation of Issues, is meant to be made applicable to the improvement of condescendences and answers, and notes of pleas in law; that in point of fact, the average number of cases that are sent to the Preparation Roll are no more than four in a day; and supposing this system to be applied to that number of cases, do you see any difficulty in these Judges, along with the Lord Chief Commissioner, getting through these cases in all the stages mentioned?—None whatever.

Would not that answer the purpose you had in view when you answered the preceding question?—It would, in a great degree.

If, in addition to this, the condescendences and answers are to be printed, and to be printed in the manner stated to you just now, with a large margin, and the amendments are to be on the blank side of that margin, would not that tend greatly to the improvement of condescendences and answers?—I think it would afford great facility in correcting them.

Could not Mr. Clerk and yourself, taking always the number of cases to be those which have been mentioned, apply your minds in the same way to give assistance (as you have done in the preparation of Issues) to the amendment of condescendences and answers, and the amendment of summons and defences?—Certainly; and I may perhaps state, that we invariably did so until the regulation under the late statute, which transferred those cases to the Lord Ordinary. We invariably at first considered the summons, and met the parties upon that; we pointed out where we thought it deficient; again, we met them on the condescendences, and pointed out where they were insufficient for the purpose of framing Issues. What we so stated, seemed frequently to have been forgotten before the correction was made, and there was a want of power of *immediately* subjecting the party in expenses. But the case will be different when the Judges perform this duty; and as they will of course come to an understanding of what a condescendence should be, there will not be ground for the complaint that the different Judges are not agreed in opinion as to the nature of a condescendence.

Would not this participation in the preparation of Issues by all these three Judges who have been mentioned bring about with celerity improvements in the system, and extend and fix the knowledge of it in the minds of all?—It has been always my opinion that it would do so. Perhaps I may be allowed to say, as to the correction of the condescendences and answers, my own opinion is, that it would be much more beneficially done privately, as we have hitherto met the parties, than in the Outer House.

The witness withdrew.

No. V.

Edinburgh, Wednesday, January 24, 1827.

The Right Honourable LORD PRESIDENT in the Chair.

William Clerk, Esq. First Principal Clerk of the Issues in the Jury Court; called in, and Examined.

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Mr. *Clerk*.

ARE you the First Clerk of Issues in the Jury Court?—Yes, I am.

Have you read the minutes of evidence given by Mr. Murray before this Commission?—Yes, I have.

Do you agree, in general, with what has been stated by Mr. Murray?—I agree, in general, with every thing Mr. Murray has said. Some questions were put, relating more particularly to himself. Some of these his modesty has led him to answer in a way to which I cannot agree; but, with these exceptions, I concur in every thing.

Are there any particular points in which you differ from Mr. Murray?—None.

Will you have the goodness to mention if there is any thing you wish to add to what he has said?—I do not find that there is any thing I wish to add. His evidence, in so far as I can recollect it, appears to me to comprehend all that has occurred to me.

Will you have the goodness to detail the exact manner in which you proceed with Counsel and Agents in preparing the Issues?—When a case has been transmitted to Mr. Murray and myself, who are Clerks to the Issues, we, in the first place, proceed to examine the summons and defences, and consider if the summons is relevantly laid, and the conclusions properly deduced. If it appears the facts are sufficiently detailed in the summons to enable us to frame an Issue, we call upon the Agents to know if there are any other material facts they wish to have added. If they declare they are satisfied with the statement in the summons, we meet them to draw the Issues. If the detail, in point of fact, does not appear sufficiently minute or accurate, as given in the summons, a condescendence is ordered. When a condescendence is given in, if the facts are stated with sufficient accuracy to enable us to draw Issues, Issues are drawn, and drafts of these are given out to the Agents for the parties without delay. But if the condescendences and answers are not sufficiently correct, and the case is otherwise attended with difficulty, we hold a meeting with the Agents and Counsel for the parties, when the condescendences, &c. are corrected, and the Issues drawn, with the assistance of the Counsel. The draft of the Issues, together with the whole papers in the process, is then transmitted to the Lord Chief Commissioner, by whom they are farther considered, and intimation is sent to the Agents for the parties to attend his Lordship. If they are satisfied, the drafts are approved, as a matter of course, and are the Issues to be tried. If the parties are not satisfied with the drafts, they attend the Lord Chief Commissioner for the purpose of having them corrected; after which they are engrossed, in the terms of the Act of Sederunt, and are the Issues for trying the cause.

Do you find that the pursuer, as required by the Act of Parliament, frequently gives in a draft of an Issue himself?—Very seldom. The late Act has indeed declared, that the pursuer shall give in drafts of Issues, and that the defender may do so; but that order is not peremptory; for it is followed by a clause to this effect, that if they do not give in drafts, it shall then be in the power of the Jury Court to proceed to frame the Issues. I recollect, suggesting that clause to one of the Commissioners now present, it having occurred to me, if the order to give in Issues were made peremptory, it would put it in the power of either party, by failing to do so, to stop all procedure in the case, and thus afford a very troublesome and vexatious source of delay.

Do you think, if it were made more peremptory, that the parties should give in

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the Issues, that it would tend to extend the knowledge of the system?—Yes, if proper compulsators were applied.

Mr. *Clerk.*

Has any thing occurred to you as a proper compulsator; such, for instance, as holding the parties confessed, or as having abandoned the cause?—Perhaps it might be by a fine, or by holding the parties failing liable to the expenses of attending the meeting appointed for the purpose of adjusting the Issues, which had proved abortive.

And would you recommend, that that system should be acted upon rigorously?—Yes. Because regularly enforcing the giving in drafts of Issues would certainly have the beneficial effect of drawing the attention of Counsel to what the condesendences ought to be, and I would humbly propose, that this should be done at an early stage of the business; perhaps the Issue should be that to which attention of the Counsel is first called.

Would you propose that it should be given in at the same time as the amended condesendences?—Yes.

You are aware of the duty of preparing the drafts being laid on Counsel by the Act of Parliament?—Yes. I may perhaps be permitted to mention, that in point of fact, that of those Issues which have been prepared by Counsel for the parties, not more than one or two have been adopted as the Issue upon which the case was to be tried, and that those were Issues of the simplest kind. In cases of assault, for instance, where the form is now fixed and reduced to mere words of style, which are adapted to all similar cases, and only require to be filled up with the names of parties, places, and dates; with that exception, I think I have hardly seen any Issue given in that would answer. I had one put into my hands this morning, which is certainly very different from what must be the Issue.

Is the practice of tendering the Issues very rare?—Not very rare; it has been pretty often done latterly. Even before the last Act of Parliament. I took it upon myself, in the notification to the parties to attend for the purpose of adjusting Issues, to request that drafts of Issues might be produced as a matter of favour to myself, which in some cases was complied with.

Do you not think, that if the practice were to become universal of obliging Counsel to prepare Issues at the early stage of the proceeding, it would lead to their attending accurately to the statement of facts in the condescendences?—I certainly do.

And do you think that would improve the whole system?—Unquestionably.

Do you consider the Issues as a sort of test of the propriety and relevancy of the condescendences?—Yes.

Were you the first Clerk of the Jury Court, and did you assist in the preparation of Issues under the Act passed in 1815?—Yes; when Issues were remitted to the Jury Court from the Court of Session, and were directed to be prepared by me.

At that time were condescendences and answers prepared in the Court of Session, with which the Jury Court had no concern?—Yes.

In the preparation of those Issues, there is a clause, requiring that you shall communicate with the Lord Chief Commissioner upon the subject of them; do you do so?—Constantly.

When these Issues went to the Court of Session, were they either adopted or amended in Court?—Yes.

Did they then come as Issues to be tried?—Yes.

Did that take place regularly until the year 1819?—Yes.

After the Act of 1819 passed, in all the causes that were appropriated to the Jury Court, and in all the cases that were sent entire from the Court of Session to the Jury Court, did the preparation take place in the Jury Court from the commencement to the close and settlement of the Issue?—Always, except in cases where a question of relevancy had been stirred in the Court of Session.

When there was no interruption by application, did the preparation take place in the Jury Court?—Yes.

Did

Did you then examine the summons and defences, to see if they were correct?—Yes.

Was it then that the condescendences and answers were ordered by the Jury Court?—It was, and the amended condescendences and answers.

After the condescendences and answers were in a sufficient state according to the view taken of them by you and Mr. Murray, did you prepare drafts of Issues, and send them to the parties?—Yes, we did.

Did you then meet with the Agents, or the Agents and Counsel united, for the arrangement of the Issues?—Yes, we did; and when, at meeting with the parties, it appeared that the condescendences and answers were not correct, we stated to them, that it would be necessary to amend them, but to save the parties trouble and expense, (which has been invariably our object), and to avoid further meetings, it was our practice to make out a draft of the Issue in the mean time, on the faith and understanding that the condescendences and answers were to be rectified to suit the Issue. When the condescendences were given in so rectified, the Issue was sent to the Lord Chief Commissioner, and finally settled.

Did it sometimes happen that the condescendences would not suit the Issue, even when they were before the Lord Chief Commissioner?—Yes; very often it was necessary to correct them in the very last stage.

Did this course of proceeding continue under the entire command of the Jury Court down to the passing of the Act of the 6th of George the Fourth?—It did.

Since the 29th of September 1825, when the Act of Sederunt was passed, making a distinction between the hand-roll which proceeds before the junior Judges of the Jury Court, and the preparation-roll which proceeds in Chambers before the Lord Chief Commissioner, have the causes come to you with condescendences and answers, and notes of pleas in law complete, but the record not closed?—Yes.

In that case had you to examine the summons and defences, and the revised condescendences and answers, and notes of pleas in law, altogether?—Yes; altogether.

When you had arranged them altogether, did the proceeding take place as you and Mr. Murray have described?—Yes.

Are the Commissioners to understand that the preparation then went forward, though the record was not closed as long as the draft of the Issue was in progress?—Yes.

When the draft of the Issue, either by the agreement of the parties, or by the parties being satisfied, or by their coming before the Lord Chief Commissioner, where you generally assisted, and the Issues were settled in that shape, was the record closed, and the Issue certified as the Issue to try the cause, at one and the same time?—Yes, at one and the same time, except that the record, as a matter of form, was first closed.

Do you think that considerable advantage was derived in the preparation of the cause for trial, or in other words, in the correct preparation of the Issue, by this form being adopted, in place of closing the record in the Court of Session?—I think so; because, until the very last, the record could be corrected, and very often it met with corrections until the very last moment before it was closed, and that after the matter had been thoroughly sifted.

Was that after the process had been sent from the hand-roll to the preparation-roll?—Certainly.

Do you think that considerable benefit would arise both by instructing the profession, and by improving the precision of averments, if mechanical operations were to be practised, with regard to printing condescendences and answers in a certain form, so as to make them more clear and distinct, than you could possibly make them, during the period when the Act of 1819 subsisted?—I think it would tend greatly to the correctness of the proceeding; it would facilitate the reading and correcting of condescendences.

Would it be of great use for the trial?—It would.

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Mr. *Clerk*.

Was it impossible for you to do it in the way the business went on antecedently to that period?—Yes.

The witness withdrew.

No. VI.

James Moncreiff, Esq. Dean of the Faculty of Advocates; called in, and Examined.

Mr. *Moncreiff*.

ARE you Dean of the Faculty of Advocates?—I am.

You have had considerable practice in the Jury Court?—A good deal.

With regard to Juries in general, do you think, from your observation, that they have conducted themselves with fidelity and attention, in the discharge of their duty, in the cases that have come before them?—I think very remarkably so.

Have you seen much difficulty arise from unanimity being required in their verdicts?—None at all. The only occasion I recollect, when the Jury sat a considerable time, was in one of the Edinburgh Election causes; the Jury sat for about five hours, but they ultimately gave in a unanimous verdict.

Have you, in general, found no obstruction to business from unanimity being required?—No.

Was the case to which you allude one of great detail?—Yes, it was.

In the cases in which you have been concerned, have you been satisfied with the Issues which have been prepared for trial?—In general; occasionally when we come into the actual trial, we have wished that some alteration had been made in the Issues; that has arisen in the practical operation of the trial, but generally the Issues have been very well adapted, in my opinion, to accomplish their purpose.

Do you mean that your wish arose from an anxiety for your client?—Sometimes I have known both parties wish that the issue had been a little varied; but, in general, I think, they were exceedingly well prepared.

Have you been in the practice of attending with the Issue Clerks upon the Lord Chief Commissioner; upon the occasion of preparing Issues?—Yes; very often.

Are you of opinion, that proceeding is better conducted by private discussion, than in public at the Bar?—Undoubtedly; much better.

At present, you are aware that the business of the Jury Court is conducted by a hand roll, from which the junior Ordinaries of the Jury Court call the parties before them; and when it has got to a certain length, the cause is sent to the preparation roll. Are you of opinion it would tend to expedite business if there were but one roll?—I rather think the present distinction is unnecessary; I do not think it is attended with any material evil, but I think business would go on fully as well without such a distinction.

You are aware, that at present it is often necessary to transmit and retransmit cases to the Jury Court from the Court of Session, and *vice versâ*, for the discussion of points of law and relevancy; do you think that is a great inconvenience?—Certainly; but not so much as it was at one time. It is an inconvenience still; it would be much better if it were done by a simple transference from one roll to another.

Would the inconvenience, delay, and expense, such as they are, be saved, if the jurisdictions of the Court of Session and of the Jury Court were united?—Of course they would.

Supposing the necessity of transmission to continue for any time, do you think it would be an improvement, if, when a case was sent back to the Lord Ordinary, instead of going through the forms of the Outer House, he were ordered to report verbally, or in cases to the Outer House at once, points of law or relevancy for consideration?—In many cases certainly it would; but perhaps there are cases which would scarcely be thoroughly prepared for being taken to the Inner House, without a debate before the Lord Ordinary, that is to say, the parties would not understand the bearings of the pleas against one another as they ought to do. A case which goes to the Inner House, without going to the Jury Court, it is felt, may not be fully prepared, unless the Lord Ordinary has first heard a full debate upon it; but, in many cases,

cases, where parties have been previously heard before the Jury Court before it is re-transmitted, the case might be reported with advantage at once, particularly if the cases were to be seen and interchanged. I think it would be indispensable that they should be seen and interchanged, if that course were to be followed.

You think it is of no consequence that the Ordinary should give a decision?—Surely not; it would be fully better that he should not; it would be better to report it at once after a hearing.

You are aware, that at present a trial in the Jury Court may be conducted before one single Judge, or that occasionally other Judges may be called upon to attend?—Yes.

Have you experienced any inconvenience from the trial being proceeded in by one Judge only?—Sometimes cases that involve points of law of considerable importance are tried; and when those questions of law arise, of course it would be desirable that there were more Judges than one; and sometimes the questions of law turn out to be of greater importance than they were foreseen to be before the trial took place. But certainly, in the great bulk of cases that have been tried in the Jury Court, I have seen no inconvenience whatever from a single Judge trying them.

In the generality of cases do you consider the attendance of other Judges a mere waste of time?—Yes; always understanding that the party may apply for more than one.

Suppose both parties concurred in requesting a trial before more Judges than one, do you think it ought to be granted as a matter of course, without leaving it to the Court to consider if it were a case of importance that required it or not?—I should rather think, that if both parties concurred in asking that there should be more Judges than one, it would be a test of the importance of the points likely to arise; and perhaps, in Edinburgh, at least, that circumstance might be held conclusive for granting the application. But I do not mean to give a positive opinion that it should be made *imperative*.

Have you been present at any trial where questions of great importance in law occurred before a single Judge only?—Yes, I think so: I may not be able to recollect them; but I have been present when many points of importance occurred incidentally, and I may say, that on such occasions I have frequently heard the Lord Chief Commissioner, when such questions did arise, express a wish that some of his brethren had been along with him.

Supposing a question of nicety and difficulty to arise, is it not more satisfactory in the end to hear the cause tried upon a bill of exceptions, than off hand, by a Judge sitting on the bench, without any opportunity of consulting authorities?—Certainly.

Is not that remedy always left open to the parties?—Yes. But I may observe, that I should have said before, that from the nature of the proceedings of the Jury Court, it may often happen that the existence of questions of law may be quite well understood by the parties, and yet there is nothing in the record, or previously in the hands of the Judge, which opens up all the matters that are necessary to be brought out on the trial, and consequently he cannot always form a very full judgment of what may be necessary or not before hand.

Is that not generally evident from the condescendences and answers?—The general nature of the case will be seen from them.

Do you conceive that the preparation of the Causes, and the preparation of Issues, are much better understood now than some years ago?—A great deal better, certainly.

Do you think that the Counsel and Agents themselves seem to understand the proceeding, and to be more informed of it?—Undoubtedly they are coming nearer it.

Do you still conceive the assistance of the Issue Clerks to be necessary?—No doubt of it. I do not think we could get on at all without the Issue Clerks.

Do you conceive, that with the aid of the Issue Clerks, within any given period of time, the trial by jury might be consolidated with the Court of Session?—I had

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Mr. *Moncreiff.*

my thoughts upon that subject, in consequence of a note I received some months ago; but I was taken rather suddenly with the notice last night. There was a time when I was of opinion, with many others, that we might with safety have plunged into the Jury trials at once in the Court of Session; but I must say that the experience I have had since has entirely convinced me that it was a much more prudent course which was taken in instituting the separate Court. I think that a very considerable progress has been made in the matter; but I should beg leave respectfully to say, that, in my humble opinion, from any experience I have had, it would not be prudent or wise, for a considerable time at least, to throw aside the machinery which has hitherto been used, or to attempt that system of amalgamating the whole in the Court of Session. One reason is, that, of course, the Issue Clerks have acquired very considerable experience, and certainly are of very essential importance to the whole matter. This difficulty, however, would be overcome, by taking the Jury Clerks along with the change. But, independently of this, I should be inclined to to say, in regard to the separate Court, whose peculiar province it is to try these matters upon a whole united system, that it is still of considerable importance, towards the ultimate success of the experiment, in making trial by Jury an ordinary part of the business of the Courts of Scotland. I am afraid that the experience has not gone very far yet in the practical operations, because the number of cases tried has not been so great as to make it a part of the ordinary practice, either of the Agents or Counsel, in general. Looking over the whole class of Agents, and the whole of the members of the Faculty of Advocates, who are employed in business, I should say, that the experience of a great many is hardly any thing at all yet. Therefore I should be apprehensive, that if, at a very early period, an attempt were made to throw aside the separate Court, it would be attended, in some degree, (though not in the same degree) with hazards of the same kind with those which would probably have existed if this had been originally attempted, without the aid of any separate Institution. It does indeed naturally strike one, on a slight consideration of the matter, that the same Judge who may try the cause in the Jury Court, might equally well try it as a member of the Court of Session. It is not very easy to assign positive reasons against the probability of that going on equally well; but I should be inclined to think, that under the separate and particular operation of the separate Court, there is more likelihood of the system (which it is their peculiar duty to carry through distinct from every other) being successfully prosecuted, than if the duties of the same department were hastily put into the Court of Session, and mixed with its other business. Undoubtedly it is a very desirable thing every way, that as soon as it can be accomplished with safety, the business should be done in the Court of Session, without the form of passing into a different Court: A great part of the proceedings, in many cases, must take place in the Court of Session, though the questions of fact must be tried in the Jury Court; and therefore it is desirable to bring the whole into one Court, when this can be accomplished, without danger to the experiment we are making, (and which it will still take many years to perfect); but, I think, it cannot be done yet without considerable danger to that experiment. It was natural, that at the commencement of this system, there should be considerable prejudice among many of the persons immediately engaged in business against the new method, as it tended to put them out of all their old habits. I do not think, that even yet those prejudices have entirely subsided, nor do I think they will entirely subside, until the extent of business in the Jury Court has become such as to make it a matter of ordinary and constant practice, and the persons who have the active duty of carrying on such business, have become practically accustomed to that course of things, as part of their own habits. These, in general, were the views that occurred to me on the subject.

In so far as Counsel are concerned, you must be aware, that in all probability the number of Counsel who have much experience in the Jury Court must be limited, compared with those who practise in the Court of Session?—Of course litigants will endeavour to get the leading Counsel at the Bar to manage their causes principally; but still, when there come to be a greater extent of trials, probably a greater number of gentlemen will be engaged in that duty.

How can there be a greater extent of trials than at present?—In the actual progress of the causes to trial, I imagine the number has not yet been near what it will be in the course of a little time.

If

If Jury Trial were made a part of the ordinary administration of justice in the Court of Session, must not those prejudices in the profession to which you have alluded, necessarily be more easily done away?—I think they would be very much the same in that respect.

Do you consider the prejudice is against Jury Trials or against the Court?—The prejudice is from persons being put out of their previous old established ways and habits, and from one or two other circumstances. A very obvious consideration is this, that in order to try a cause by a Jury, though the expense ultimately to the party may be a great deal less, yet the party, or the Agent, is under the necessity of producing a large sum of money at once. In the former way, the Agents got the money from their clients gradually, as the case proceeded; but by the new mode, they must produce a large sum of money; whatever is the importance of the cause, or however trifling the Issue, a large sum must be produced for the trial. That, I conceive, is one of the causes of the objections felt by practitioners relative to that mode of trial. But I think that would equally apply, in whatever form or order Jury trials were to take place. Another reason is, that the peremptory nature of the proceeding, and the conclusiveness of it, which are great advantages undoubtedly in the administration of justice, are not always agreeable to many persons engaged in the practice of the profession; because the responsibility is greatly increased.

Have you formed any idea as to the period when you think the union of the two jurisdictions might take place?—Indeed I have stretched my reflection as far as I could, to try to come to some idea upon that subject, but I find it scarcely possible. I do not know what criterion I could fix upon, except that I think a considerable number of the profession must have been previously educated to the business.

Considering that new arrangements are going on, and that the two junior Judges are to co-operate with the Lord Chief Commissioner in the Jury Court, which will give experience to them in the mode of preparing Causes and Issues; do you think the period must be accelerated by these means?—I think it may.

You are aware, that at the commencement of the Institution, the tendency of the Issues was, that they were Issues of specific fact, as contradistinguished from General Issues on the points of the cause, or General Issues?—Certainly; and they went frequently into very minute statements of particular facts, as detached parts of the case.

Has the recent tendency been to desert these Issues of specific fact, and to adopt General Issues either on the points of the cause, or General Issues merely?—Yes; in all cases, that is the object of the Jury Clerks, at present, and of the Court.

Does that seem to you to be generally understood and conceived to be a right course by the profession, and by parties in the Jury Court?—In general, I think it is very much approved of; for the former method embarrassed the trial, and the ultimate Issue of the cause very much. The General Issues are infinitely better, in my humble opinion, and, I believe, it is the universal belief.

Were you present at the advocation of the first Appeal of Lord Fife's case in the House of Lords?—Yes.

Did you hear the doctrine laid down there respecting the General Issue?—I was not present when the Lord Chancellor delivered his ultimate opinion upon it; but I attended the whole of the pleadings, and I heard his Lordship's observations as they were occasionally made on the subject.

Do you recollect a case of the name of Clarke and Spence, which was a case respecting the reduction of a deed?—Very well.

Do you remember that in that case there were three Issues?—Yes.

Do you recollect that there was a verdict upon all three Issues?—Yes. I think it was the reduction of a deed of an old lady.

Were there two trials?—There were two trials.

You are aware that the first of those trials took place antecedently to the trial of Lord Fife's case, and that the verdict was upon all the Issues?—I think so, for the pursuer.

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You are aware that verdict was set aside, and that there was a second trial?—Yes.

You are aware that the second trial was subsequently to Lord Fife's case. Do you recollect that you and the Counsel on the other side agreed to try the cause upon the General Issue, and to abandon the Special Issues?—Yes, I do remember that.

Do you remember a cause, Cunningham *v.* Clark, in which a blind man was the instrumentary witness?—Yes; I think the old blind man was examined.

Do you recollect that one of the Issues of that cause was an Issue on the head of death-bed, which was abandoned, and the other was the General Issue, if it was not the deed of the party?—Yes.

Do you recollect if that case was satisfactorily tried on the General Issue?—I think it was.

Do you remember that there was a special verdict found, and that that decided the question?—I think so; I think it was a verdict against the party for whom I was Counsel; but I think it was a satisfactory verdict, as far as I remember.

Will you have the goodness to state whether the circumstance of the trial of this cause, and of Lord Fife's case, upon the General Issue, has not established, in the minds of the profession, the General Issue, in cases of reduction, as that which is advisable?—I think so, in most cases.

Do you not think it might now be treated as the formal Issue to be used in such cases?—I think it might, in general; but there are special cases which would require special Issues.

If the General Issue is adopted as largely as the nature of cases will permit, would that not give a great facility to the understanding of the practice of trial by Jury in civil cases?—I think it would.

Supposing there were a case of Policy of Insurance, in which there arose three questions upon the points of the cause, namely, sea worthiness, deviation, and misconduct of the master, if the practice in making the averments correct, were more perfect, would it not lead, in framing the Issue, to more security in placing the Issue upon the special points of the cause?—Certainly; the more precise the averments can be made, with relation to the category of law under which the averments are intended to be tried, of course, it will facilitate the trial of the cause very much.

Would it not be a natural and easy step from that, to try all these points in one cause, upon a General Issue, on the question of liability or non-liability?—In general, I think that that is quite practicable, in many cases, taking this along with it, that the previous pleadings sufficiently indicate, to each party, the nature of the Issue to be tried.

Would you also recommend that the averments should be made with sufficient distinctness, so that there should be no surprise on the party, as to what was to be brought against him?—Yes.

Do you not think that the mode which is adopted in this country of having Condescendences and Answers with the averments so perfected, would lead to great safety in the administration of justice under the General Issue?—I think it would.

Would not the having other Judges to assist in proceedings at Chambers aid the extension of the knowledge of the system, with a view to preparations?—Certainly.

Instead of confining it, as the preparation roll does now, do you not think, by the union of the preparation roll and hand roll in one, the two junior Judges, or the other Judges of the Jury Court, and the Lord Chief Commissioner, might all partake in the acts of preparation?—Yes.

Do you think that that would not only extend a knowledge of it, but infuse it more generally into the minds of the profession?—I think it would have a tendency to do so, certainly.

Supposing, in the class of cases that are appropriated to the Jury Court, (of which none have attained to a perfect General Issue but assaults and reductions,) the General

General Issue could be applied with the same degree of certainty to all those cases that admit of the General Issue; would not that give a great facility to the administration of justice in trials by Jury?—Of course it would; my opinion certainly is very clear, that whenever you can make a General Issue with safety to the trial of the cause, it must be a great advantage to the whole system.

Has not the trying of causes by the presiding of the Judge, and the impanelling of Juries, gone on upon the whole in a very satisfactory manner?—Certainly it has.

Have the corrections that are afforded by new trials, and by bills of exceptions, as far as they have gone, been adequate to the end of remedying any mistakes and errors that may have crept in?—I think they have. Upon the whole, I think they have been quite adequate; of course it is not to be supposed, but that parties will occasionally be dissatisfied when they lose their cause: but I am of opinion, that the remedy on the whole, to the effect of obtaining the deliberate opinion of the Court, is as adequate as any other can be.

Have the great principles upon which new trials should turn, got to be well understood?—I think so; in general they are very well understood.

You are aware, that from the proceedings in the last case before the House of Lords, some difficulty has occurred respecting the form of bills of exceptions?—I am aware of it.

Has there been a considerable number of bills of exceptions carried from the Jury Court to the Court of Session?—Yes, I believe there have been a good many; I have known of a good many myself.

Has one or two been carried to the House of Lords?—Yes.

From the experience which you have had in the Court of Session, have you found that the remedy by a bill of exceptions has corrected the decision when it was wrong, or confirmed it when right?—It has put things right in general; at any rate, it has enabled the Court to form a judgment upon the question of law that came before them, so as to give the party the benefit of the deliberate judgment of the Court, whether he has been satisfied with it or not.

Do you consider it would be important to put the preparation of these judicial instruments in a good shape?—I think it would.

Do you hold the same opinion with regard to special verdicts, and special cases?—In some cases, the special verdict is the most convenient of all ways of bringing the law before the Court, and therefore it is of great importance that there should be as perfect a system as can be obtained for the adjustment of special verdicts: they are particularly useful in some cases of Insurance, and in some cases of Reduction.

You are aware, that, in special verdicts, it is essential that no facts should be stated, from which a conclusion is to be drawn by a Jury, but only facts from which a conclusion of law is to be drawn: Is that distinction yet sufficiently established?—I am not sure that it is. The last case of a special verdict which we had, was one of very great difficulty: It was an Insurance case; and Mr. Jeffrey and I adjusted the special verdict, with the assistance of the Lord Chief Commissioner: It was a special *case*, which it was agreed should be allowed to stand as a special verdict. The way in which that took place, was that a motion was made for a new trial upon some points of law, and upon alleged misdirection. The case having been heard, the Court considered the question to be attended with very considerable difficulty, and it was agreed between the parties, that, instead of trying it over again, we should adjust a special case to be taken as a special verdict.

You are aware, that in that case there was a question regarding sea-worthiness, for want of a pilot; and there was a question with regard to abandonment, and also as to the conduct of the master, and that those three points were brought out upon Issues, which were mixed partly upon the points of the cause, and partly Issues of specific fact—would not that case have been more satisfactorily tried, if it had been put upon a General Issue?—I think it would: we had considerable difficulty in the trial of it.

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Would not the Court have got considerably easier to the ends of justice by that method?—Yes; I think so.

Has any mode occurred to you of assisting in the preparation of all the judicial instruments which have been referred to, which would improve and accelerate the system?—I cannot say that I am prepared to suggest any thing at this moment.

Do you consider the putting in of admissions to be of great advantage in the present form of preparing Issues?—Certainly a very great advantage; it saves a great deal of expense and trouble.

Are the Commissioners to understand that you find it attended with no inconvenience, but with much advantage?—With no inconvenience, but with every advantage.

Do you find, in general, that there is a disposition, in all who practise in the Jury Court, to become more and more reconciled to the system of Issues, as it now proceeds?—Yes; at first they were very unwilling to make admissions rashly, but I think the general disposition is to admit what is known to be capable of easy proof, and the proof of which, if not admitted, would occasion expense, and occupy time unnecessarily.

Attending to all the improvements which have been suggested, and under such arrangements as, after further experience, may be thought proper, do you think that, three years hence, the business of the Jury Court may be safely devolved upon the fifteen Judges of the Court of Session?—I do not know. I should be afraid to say that within three years that devolution could be made, without some of the hazards which must attend the change itself; but, at the same time, three years may make a very great difference; and by the time we come to the end of that period, it may be perfectly clear that we can safely do so. I refer to that sort of hazard which I formerly mentioned; I mean the want of universal experience among those engaged in the business, and in the Court itself. The Judges of the Jury Court at present have had very considerable experience, and those who have lately entered into it, will be acquiring experience; but that does nothing for the Judges who are not in the Jury Court.

Are you of opinion that arangements might be so made as to enable the legislature, with safety, to devolve the whole of the business upon the fifteen Judges?—It would make a great difference in my opinion, if arrangements were to be made, by which the full benefit of the experience of the existing Judges in the Jury Court were insured for the further practical operations of the Jury trial In that case the change would probably tend to a considerable saving of expense both to the parties and to the country, without any of the dangers which might otherwise attend it.

Do you allude to the experience in the preparation of the cases chiefly?—No; I speak more particularly of the experience in the actual business of the trial.

Have you had occasion to attend any of the trials conducted before the lately appointed Judges in the Jury Court?—No, I do not think I have.

Did you officiate in Fraser and Miller?—No, I did not. I was Counsel for the defender in the cause; but I was in Inverness-shire at the time of the trial, and Mr. Solicitor General conducted the defence.

Were you Counsel in the former trial?—The former trial was at Inverness, at the previous Autumn Circuit, and I was not there. I have not attended any trial either before Lord Mackenzie or Lord Cringletie.

Was the verdict which was given on the second trial contrary to the first?—Yes.

Are you aware that no motion has been made for a new Trial, but that the last verdict has been acceded to?—I believe it has been.

The form of Trial in the Jury Court being fixed by Act of Sederunt, and perfectly open to any person whatever, is there any more difficulty in a judge of the Court of Session, newly appointed, trying a cause in the Jury Court, than a Judge, newly appointed in the Court of Justiciary, trying a cause in the Court of Justiciary, the forms of trial being both equally well known?—A Judge newly appointed to the Court

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Court of Justiciary, who has not had some practice in Justiciary trials in the course of his previous professional life, must, I should humbly think, find himself in rather an awkward situation; but, at the same time, I should think that there is a considerable difference; because, on the one hand, the questions that arise on a civil trial are in general much more intricate, and the manner of managing evidence is more difficult; and, on the other hand, the Judge has not, what he has in the Justiciary Court, a plain line to direct him; for, unless the evidence be clear one way, the conclusion must be for acquittal. His duty is therefore much more simple, as he knows that there is a legitimate leaning in favour of the prisoner, unless a clear case is made out against him. But in the trial of a civil cause, the balance is quite equal, or nearly so, between the parties; and the questions and the nature of the evidence are very often exceedingly intricate. I speak of this difference, in regard to the general run of criminal trials, as being comparatively simple; though, at the same time, there are some trials in the Court of Justiciary which are as intricate as any civil cause could be.

Does what you have last stated apply to the summing up of the case?—Yes.

You are aware, that if a newly appointed Judge in the Jury Court, by accident, gives a wrong direction, there is a remedy by a bill of exceptions, but for any error in the Court of Justiciary there is none?—In that view the hazard is much less.

Is not the variety of facts much greater in civil cases than in those of a criminal nature?—Yes, and the difficulties of the evidence are sometimes very great.

Keeping in view the arrangements and regulations that may be made, and those which further experience may suggest, do you not think that, at a future period, three years for instance, the duties of the Jury Court may be safely devolved on the fifteen Judges of the Court of Session?—I thought I had said, with an explanation, that I considered it very probable that about that period it might be safely done.

With a view to facilitate Jury Trials, and the ordinary administration of justice in the Court of Session, have any improvements in the present practice occurred to you?—I am not sure that I can suggest anything material.

The Dean of Faculty withdrew.

No. VII.

Edinburgh, Saturday, January 27, 1827.

The Right Honourable the LORD ADVOCATE in the Chair.

Mr. *Solicitor General*, a member of the Commission; Examined.

Mr. *Solicitor General*.

HAVE you had a good deal of practice in the Jury Court?—I have occasionally had practice in the Jury Court.

Have you also attended at the preparation of Issues?—In all cases in which I have been concerned, and occasionally upon discussions of more general interest.

Will you have the goodness to explain the present practice relative to the Issues?—Hitherto, I believe in most cases, the parties have not been in the habit of giving in drafts of Issues, though the notice always calls their attention to their right to do so if they choose, and there seems to be a sort of recommendation to do it, if they think fit. In most cases I believe they do not bring them, which arises generally from a feeling that the Issue prepared by the Issue Clerk will probably be a better one, and that each party might be too tenacious in defending his own. At the same time, I have always been of opinion, though I do not know whether it could be immediately or how soon enforced, that it might lead to greater accuracy in the preparation of condescendences and answers, if Counsel framed the Issues; for he would have his attention more forcibly and necessarily directed to those matters which bore on what appeared to be the true question in Issue between the parties; whereas, matter is sometimes introduced in consequence of the averments of the other party,

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without much reference to its materiality. When the Issues are prepared by the parties, or when the parties come before the clerk to consider an Issue which he has prepared; in the first case, they go for consideration before the Issue Clerk—in the second case, the Issue prepared by the Clerk is read to the Counsel. If it immediately appears to be one, to which neither party has any objection, the Issue is often settled at the time; subject to alterations being made during the period allowed for that purpose, even before it is submitted to the consideration of the Lord Chief Commissioner. If the slightest wish to take time to consider the Issue is expressed by either party, that time is always granted, and the parties again come before the Issue Clerks to consider the terms of the Issue. I believe for a considerable period past, for the last two or three years, there has been comparatively little of that discussion as to the terms of the Issues which used to take place. It is very seldom that there is now much discussion. There may be occasionally; but generally a reference to the Lord Chief Commissioner has been satisfactory to both parties.

Is it your obinion that the system is becoming better understood by the profession generally?—Very rapidly—unquestionably so. I may state, that of late, I have never heard from any quarter whatever the slightest indisposition to the most extended use of the General Issue, to which any person could wish to have recourse. On the contrary, I rather concur in an observation of Mr. Joseph Murray, that sometimes a party pays for a General Issue, when it is truly a case in which you cannot make what is properly called a General Issue, but when it is a special case. Neither do I know that there ever was any great indisposition on the part of the Bar to General Issues. I rather think the supposed feeling against them, sometimes ascribed to the Bar, was considered to be much stronger than in reality it was. The objection which some members of the Bar may have had at the first Institution of the Jury Court to the trial of causes upon a General Issue, arose from the prevalent feeling at first, that all the points of law, which the Judge might decide at the trial, could not easily be brought under review of the Court of Session or the Jury Court; and sometimes, no doubt, it was imagined, that by Issues on specific facts, you excluded the Judge from the determination of questions at law. That was a great mistake; for in most instances, it just imposed upon the Judge the same necessity of delivering the law to the Jury, as if the question had not been put in that shape; for in truth, the specific Issues were intended to exhaust the whole matters of fact at issue between the parties; and therefore every doctrine of law applicable to any of these facts, it was equally necessary for the presiding Judge to deliver an opinion upon, in addressing the Jury, whether the question to be tried by them was split into specific Issues, or whether the whole facts were to be exhausted by a more General Issue. And, indeed, the notion of attempting the trial of causes, by endeavouring previously to separate the whole law which the case might involve from the facts (which was rather too much the principle on which the Issues were originally framed,) is one which the least experience of the system of the trial of civil causes by Jury was calculated to correct—inasmuch as in most cases, the facts cannot be tried, unless the law applicable to the state of the facts appearing in the evidence at the trial is stated to the Jury by the Judge, and so ruled by him; and in many other cases, either the verdict (if the case is tried on a proper system,) leaves no law to be determined, or the previous determination of the law would render the state of the fact often of little importance. I may be allowed to add, that I think that the Bar, (according to my observation,) were not so much wedded, as has been supposed, to the principle of trying causes on which the first Jury Court Act seems to be framed. I think, as soon as Counsel saw that it was far more desirable that the whole matter should go to the Jury, under the direction of the presiding Judge, leaving the party dissatisfied to apply for redress afterwards, it was at once felt, that the supposed objection to General Issues, (which I do not think was very generally entertained,) did not apply, and that that was the best mode of trying ordinary causes.

Have you any suggestion to give to the Commission as to the improvement in the mode of the preparation of Issues?—Supposing the system that has been recently put in operation is continued, none whatever;—supposing the junior Judges of the Jury Court shall assist the Lord Chief Commissioner, and receive the benefit of his views in the preparation of Issues, and so be trained to that business, (the benefit of the assistance of the Clerks being retained as at present), I see no other improvement. I think it may be very right that the Judges who preside, should be the persons to judge of the time when to enforce the regulation as to parties giving in drafts of Issues.

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Issues. The Judges and Jury Clerks will be the most competent to judge when that should be imperatively enforced—that is, as soon as the system comes to be well understood. Besides the saving of time, it may be of great advantage in the preparation of causes.

You are aware that the words of the Act of Parliament are imperative?—Yes; I am; my opinion is given, merely as to its being a matter of expediency in regard to a change in the existing practice.

Do you think these alterations will tend to make the system more generally understood throughout the profession?—Most materially, most usefully, and very rapidly. There is one particular suggestion, as to the preparation of Issues, which, as my opinion has been asked, I should wish to offer. It is a suggestion that I am the more emboldened to make, because I rather think it is one, of the importance of which, Counsel have more opportunities of judging than the Judges of either Court. It is with reference to cases, not in their own nature Jury cases, that are sent by the Court of Session to the Jury Court, in order to ascertain matters of fact arising in the cause, and necessary for the decision of questions of law, and afterwards to return to the Court of Session for the application of the law, in case the parties do not think that the verdict exhausts the cause. It frequently happens the case does not go back at all for determination, if the facts satisfy the parties how the law must be disposed of. I do think, that the relative situation, in those cases, of the Jury Court to the Court of Session has, sometimes, not been considered in the light, in which, if one looks at the situation of the Lord Chancellor sending an Issue to *Nisi Prius*, (that is, to be tried in a Court of Law by a Jury), one would be inclined to consider the matter. The case is often sent to the Jury Court here, without any note or expression of the views of the Court in sending it; and, generally, without the Issue being stated which the Jury Court is to try.—Both Divisions of the Court, and also the Lords Ordinary, in general, have thought very naturally, that the Issues might be much better framed in the Jury Court, by those accustomed to frame them, than by themselves; and they have not wished, in any degree, to tie up the Jury Court in trying causes. Thus the causes have been sent without any special Issue, and without an interlocutor embodying the views of the Court, so as to put the Jury Court in possession of the views with which the cases are sent, or to inform them what were the questions to be tried and determined by a Jury. The object the Court has had in not wishing to fetter the Jury Court in trying the cause, or in having the Issues well framed, might be equally well attained before the Issue was finally settled, by allowing the case to be considered by one of the Jury Court Judges, or by one of the Jury Court Clerks. But I do think that it is a considerable objection, and occasions much practical inconvenience in the trial of these causes, when they go to the Jury Court, without any special Issue being made up by the Court, of what it is they wish to have tried, or without any expression of the views under which they are sent. I have frequently seen the Jury Clerks experience embarrassment in knowing what Issues were to be put in the cause. They have, at times, been led very naturally to consider, that the relevancy of many of the facts were determined by the Court, merely by the circumstance that the cause had been sent for trial to the Jury Court, while in reality the view of the Court of Session in sending it was simply this, that the state of the facts was not sufficiently ascertained to enable them to determine upon the relevancy of such matters of fact; the Court of Session intending that such points of law should be entirely open to the party at the trial of the cause, and not having it in view at all to decide indirectly upon such points of law, by directing the cause to be sent to the Jury Court. Their object had been, that if the facts were found by general verdicts, or special verdicts, (as might be necessary), the law should afterwards be applied in the Court of Session,—if the party was dissatisfied with such direction, in the charge to the Jury, in regard to the law as was necessary for the trial of the cause, and applicable to the case in the course of trial. I am inclined to view the situation of the Jury Court, in reference to the Court of Session, in this *particular* class of cases, (to which exclusively my present suggestion is confined), in the same light in which the Courts of Common Law in England seem to stand, (so far as I can form an opinion), to the Lord Chancellor. I do not think it is doing the trial of such causes altogether, in many instances, fair play, if, when the fact is to be ascertained for the satisfaction, in reality, of another tribunal than that which tries, the point to be tried is not stated; and the Issue, which the Court sending the case wishes to have decided, is not framed by themselves. I am far from thinking—quite the reverse—that the full benefit and assistance of the consideration of cases before the Issues are adjusted by

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any of the Jury Court Judges. or the Issue Clerks, ought not in such cases to be obtained. I think such benefit might be easily obtained. But I have seen some cases, in which recourse has been had to the Note Books of the Judges in the Court of Session of what passed when the cause was sent to the Jury Court, in consequence of the Jury Court Clerk stating, that he did not understand the views with which the cause was sent for trial, or the questions to be tried. The general feeling has been hitherto, that the Issues would be better prepared in the Jury Court; and the views with which they were sent being fully impressed at the time on the minds of the Judges sending them, it did not occur that (at the lapse perhaps of six or seven months), when a case comes before the Jury Clerk, and the Counsel may differ in their statements as to the views of the Court in sending the case,—every person in the Jury Court would be in great embarrassment, *and the Jury Judges also*, as to the views with which the case was sent. Certainly it would be at all times a pity (until the system is more understood) if the Issues in such cases were finally settled in the Court of Session, without being considered by the Issue Clerk or Judges. In some cases the Issue has been prepared in the Court of Session by one of the Jury Court Judges, (of whom there is one in each Division), in order to show distinctly the fact intended to be tried. In regard to all or most of the cases to which I have now alluded, I think that a similar course would be a practical improvement. I should be very sorry, if in any arrangements, the full benefit of the great experience and very great acuteness of the Issue Clerks in the preparation of causes, should not be obtained, in case of any practical difficulty occurring in the preparation of Issues in the Court of Session. It will be understood, I hope, that the suggestion which I now offer is limited to the cases which are not proper Jury causes, but in which a question of fraud, or some Issue in fact, arises, similar to the questions which the Judges in the Courts of Equity in England seem occasionally to send to the Common Law Courts for trial. To send the whole pleadings in these cases to the Jury Court, without stating the view with which the cause is sent, or the question which the Court wishes to be tried, although the case is truly sent in consequence of the particular views which the Court of Session entertain of the case, and in order to try a particular question, humbly seems to me to be inconsistent, and is inconvenient.

In *other* cases, which turn out to be wholly proper Jury causes, certainly it is desirable that the case should go to the Jury Court, restricted by no previous finding, unless the case shall thereby be better prepared for trial, which will not often happen.

As you have compared the Court of Session, sending an Issue to the Jury Court, to the Court of Chancery sending one to the Common Law Courts, and as the Chancellor always puts in his decree the Issue he proposes to be tried, will you have the goodness to state, whether you do not think the best way would be for the Division, or Lord Ordinary, as the case may be, to put in his interlocutor the terms of the Issue he wishes to be tried, and then the Jury Court to put that in the shape of an Issue to go before the Jury?—Most certainly that is my notion; taking the full advantage of the experience and acuteness of the Issue Clerks, and allowing the case to be considered by the Lord Chief Commissioner, or other Jury Court Judges, before the Issue is finally adjusted. But when, in fact, either Division in reality contemplates the trial of a particular Issue, as is stated in the question, the Issue should be embodied in the interlocutor.

Are the Commissioners to understand you as recommending, that when the Court of Session mean to try a question upon which their mind is made up, the interlocutor should contain the Issue; and when they mean not to try a question, but to remit the case, they should remit it simpliciter?—Yes.

Your practice in the Jury Court did not begin, did it, until after the Act of the 59th of the late King was passed?—I was seldom in cases before the date of that Act. I had only been two years and a half at the bar before that Act.

Do not your observations upon the state of Issues apply to the time during which you have practised?—Yes. I am quite aware that great embarrassments were found under the original Act, when the Issues were prepared in the Court of Session, and when they were Issues on the specific facts in a cause,—framed apparently on the attempt of leaving the Judge, at the trial, no law on which to deliver an opinion to the Jury. Issues of that description, in which, (though the cause involved purely a Jury question,) it was attempted to split the case into a number of minute specific points,

points, I consider to have been very inconvenient, and greatly to have impeded the working of the system. My suggestion is confined entirely to cases depending upon matters of law, and not Jury cases at all; but in which the Court of Session wishes to have the leading facts of the case, on which they are to give judgment in point of law, ascertained by a Jury. It is quite conceivable, even in such cases, that the only verdict to be returned may be a general verdict.

Do you think it right, if a case were sent entire to the Jury Court, that it should be dealt with in regard to the preparation of the Issue, in the same manner as a case of the same species is dealt with, such action (as happens in reductions) being among the appropriate cases?—In the class of cases to which allusion is now made, I think the cause is truly decided by the fact, *e. g.* if the fraud is proved, and found to be proved by the Jury; for the application of the law is a mere matter of form, and unless difficulties arise on the verdict, the Court of Session will never know any thing of it at all. In such reductions and similar actions, of course I consider that the case should go on in the Jury Court in the same manner as in an appropriated action, or any other. In the case of reduction on the head of fraud, if the fraud be established by the verdict of the Jury, the application of the law is a mere matter of form, and the Court never, in reality, would know any thing about the case at all, unless the Jury found a special verdict, or unless some incongruity or difficulty appeared on the face of the verdict. Sometimes, no doubt, the verdict may suggest a difficulty in the application of the law,—as, for example, in one very simple case, indeed, (a question about a house in the Grassmarket), in which it was necessary to have certain matters of fact ascertained, and in which the Jury found some facts proved, and others not; and the verdict did not exhaust the points in dispute. The Issues were framed in the Jury Court. Upon going to the Court of Session, Lord Eldin set aside the verdict, and ordered the parties to condescend of new. He held the verdict to be good for nothing.

In that case were the Issues quite of specific fact?—They were; but I may perhaps be mistaken as to that.

Do you find considerable advantage in the measures that are taken before the Clerks of the Issues, and likewise afterwards in the intercourse which the Lord Chief Commissioner holds with Counsel, in getting the Issues brought to expressions that suit the nature of the case; and do you find that the system is improving in that respect?—No doubt there is a very rapid improvement in the adaptation of Issues to many particular cases. That improvement has been very rapid and striking; and I think, the only way in which business could be carried on before the Issue Clerks is in Chambers. I am not altogether sure, whether on the other hand the circumstance, that deliberations with the Judge have been always in Chambers, has not partly tended to retard in some degree the diffusion of the knowledge of the system among the profession.—I sometimes think, that, perhaps, after a case is considered by the Judges, if their views were stated not in Chambers for the benefit of the particular Counsel present in the case, but as is now proposed to be done in Court, the knowledge of the system might have been more extended. I am rather doubtful of the utility of any judicial deliberations or deliverances, the grounds of which are not stated and explained in open Court.

Do you think, the new plan to which you have alluded, will be productive of great advantage?—Yes. I think, after the case has been fully considered by the Judge, so as to enable him to decide upon the propriety of the Issue framed by the parties, or by the Issue Clerk, the *final* explanation (where there is a difference of opinion among Counsel), in Court of the grounds of the opinion of the Judge, when there may be a full attendance of Counsel and Agents, will be of considerable importance —previous discussion at Chambers not being precluded.

The great object being to get General Issues, (in those cases that admit of a General Issue), appropriated to the particular nature of the action, and as that has advanced only a short way hitherto with any certainty, is it not advisable that as actions come before the Jury Court for preparation, attention should be paid not merely to the particular cases, but to try to frame a General Issue for all actions *ejusdem generis*, that may afterwards suit as a formula?—Certainly; and it appears to me that has been very much, and very successfully kept in view; I should say that many General Issues have been perfectly well adapted for subsequent cases, to an extent beyond what the question implies.

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Are the same inconveniencies felt, in regard to transmission and retransmission from the Jury Court to the Court of Session, as were complained of some time ago?—Not that I am aware of. The inconvenience does not appear to be felt very much in practice; there is no expense I believe, but that of a trifling charge to the Fee Fund, and not more delay than would be experienced in the discussion of the cause in the Jury Court.

Do you think it an improvement to allow the Lord Ordinary in such cases to report verbally, or in cases?—I think that in point of propriety, it is right and fitting that the case should go to one of the Divisions. In general, I consider, that in the Jury Court, before they will remit the case to the Court of Session upon a point of law, the cause will be sufficiently prepared, so as, in reality, to bring out the point, and show what it is, on which the Court of Session is previously to deliver an opinion. Probably it is most expedient, that the Jury Court should so prepare the cause. It is not likely that much benefit will be derived by going first to the Lord Ordinary, and then to the Court of Session; but, if necessary, the Court of Session can have such actions afterwards prepared for their decision, if not so prepared in the Jury Court.

In so far as regards the trial, does it appear to you that the Juries have conducted themselves in a way that has appeared desirable?—Always. Nothing is so remarkable, respecting the introduction of so delicate a matter as the decision of civil cases by Jury, as the way in which Juries, from the commencement of the Institution, have discharged their duty.

On the part of the Judges, have the cases always been dealt with in a manner that was most desirable?—Yes, most undoubtedly.

Does that remark apply as well to the Judges who have been lately appointed, as to the others?—I have had some experience as to the more recently appointed Judges, and I am, most undoubtedly, desirous to apply the remark to them most strongly.

Will you have the goodness to inform the Commissioners whether the suggestion you made as to the Court of Session. pointing out the particular subjects they wish to be inquired into, would not be fulfilled if parties were to follow the sixth section of the Act of 59th George the Third, which says, "That it shall be lawful and competent for the Court of Session, in either of its Divisions, in all cases depending "in the Inner House, in which matters of fact are to be proved, if it shall appear "to them expedient, for the due administration of justice, to order and direct, "by special interlocutor, the whole process and productions to be remitted to the "Jury Court, for the said Court to settle an Issue or Issues, and to try the same by "a Jury, as aforesaid; and if it shall appear to the said Divisions to be expedient "for the due administration of justice, they may pronounce an interlocutor, pointing "out the matters of fact which they require to be determined by a Jury; and the "said Jury Court is hereby authorized and required to settle Issues, in terms of such "interlocutor; and the said Court may likewise settle such other Issues as may "arise out of the examination of the case by the said Court, and try all such Issues "by Jury in manner aforesaid?"—I think, that, in some instances, the provision, to which I have been referred, will answer that purpose, but I applied my observations rather, perhaps, to the *practice*, than to the *power* of the Court;—At the same time I have always considered, that this clause was not very distinctly or correctly framed; for I think an interlocutor, pointing out the matters of fact which the Court intend to be determined by a Jury, must, in reality, state (perhaps with some formal difference in regard to the words) the Issues that are to be sent to the Jury; and that if the interlocutor does not so state the points to be tried as a general question, the specification of matters of fact, which the clause in question seems to contemplate as something different from the Issues to be tried, would lead to a long, embarrassing and useless detail, probably inapplicable to what may turn out to be the state of the case. The Court has power to proceed either way;—they may say, for instance, that they wish certain matters of fact, relative to an allegation of fraud ascertained, and they may leave it to the Jury Court to settle the Issue, or the Court of Session may settle the Issue in such a case;—the latter seems to me the correct plan. I may add in explanation, that, I think, an illustration of the benefit of the remark I ventured to make, arises from a case to which incidentally reference was previously made; at first it was intended to send a case entirely to the Jury Court, where the object of sending

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sending it was limited in reality to a very narrow point,—the destruction of a deed anterior to a particular period. The case involved an immense number of matters of fact, which the Court of Session, at that time, did not intend to send to the Jury at all, being an action of proving the tenor. The inconvenience of sending the case, without stating the Issue which the Court wished to be tried, was pressed upon the Court. The Issue was accordingly framed by the Division of the Court before whom the cause was depending, and the Issue was tried at once in the Jury Court without any discussion or embarrassment.

From the state of progress in which Trial by Jury now is, is it your opinion that that mode of trial may be speedily united with the Court of Session?—That is my opinion. But before leaving the subject of the trial, there is one suggestion I have always been anxious to state, which I consider, in regard to the mere trial of the cause, to be of great moment. Very great difference of opinion, it is known, has been entertained as to the manner in which the cause is stated to the Jury, and it is one of the points on which considerable difference of opinion exists at the Bar. Some wish to see the course followed in the Court of Justiciary introduced into the Jury—that is, of the evidence being adduced without any opening speech from the Counsel on either side, and then that, at the close of the evidence on both sides, the Counsel of the respective parties should address the Jury. In that notion I do not concur. But I have observed, that a great part of the difference of opinion has arisen from the rule, that the senior Counsel for the pursuer does not both open the case and reply; so that the pursuer has an undue advantage in a reply from a Counsel who had not previously addressed the Jury. I consider very considerable detriment has arisen from that practice of two Counsel being allowed to speak for the pursuer, and of the senior Counsel not being obliged both to open the case and to reply. I think it relieves the senior Counsel in a degree, to which he ought not to be relieved, of the previous consideration of the case, with a view to the way in which it should be brought out before the Jury. It does not compel him to give the same attention, as in England, to the manner in which the evidence is to be laid before the Jury, or to previous preparation for adducing the evidence; and very frequently the views of one Counsel cannot be so fully communicated to the other, as that the senior may not leave out a great deal of evidence on which the junior has opened, or take a different order of proof, or throw out in reply entirely new views as to the effect of the evidence; and in that way I do not think that the same attention has been given to the preparation of causes for trial by the senior Counsel, which he otherwise would be compelled to bestow upon it. The manner in which it is done in England, by the senior Counsel explaining his views in opening the cause, as to conducting the case, and adducing the evidence, shortens the trial greatly. It compels him to attend much more to the selection of the witnesses whom he wishes to call, and to the points upon which the witnesses are to be examined. He thus gives the other Counsel assisting him directions as to the points, upon which he, who is conducting the cause, wishes that the examination should chiefly proceed. At present, the junior Counsel opens the cause—the consultation cannot have put him so entirely in possession of the views of the senior, as that he can know altogether the way in which the cause should be stated; then the examination of the witnesses does not proceed upon any one connected distinct view of the case, given as a guide to all the other Counsel, and which, whether the senior is right or wrong, ought to be followed in the management of the case,—which tends greatly to expedite the trial of causes in England,—gives much more unity to the management of the cause, and leads to more method and arrangement in the manner of proving it. Then again I consider it to be positive injustice, that, at the close of a long case, the leading Counsel for the pursuer, whose views have never been heard before, should be able to address the Jury in reply—in a speech entirely new—not fettered in the least degree by the line in which the junior has opened the case—upon points which perhaps have been little touched on, and to which the attention of the Counsel for the defender has not been called—in short, that the most elaborate, the most effective, and the fullest speech for the pursuer should be a reply by the senior Counsel, by whom nothing has been previously said at all, and for which speech, of course, almost every thing valuable is practically reserved. It is an advantage to a pursuer, which I think amounts to injustice, and it is attended with no fair benefit whatever to the administration of justice. In many cases, the impression likely to be made by the reply of the pursuer's leading Counsel, is that which is most dreaded in the whole cause. It is known, that the great object, in a great many instances, in the conduct of a cause for the defender, is to exclude the

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reply, because it is to come from one who has not spoken at all, namely, the leading Counsel for the pursuer, and of whom the Counsel for the defender is most afraid. If the senior Counsel were obliged to open the case, it would happen, as in England, that when he makes a speech in reply, which is not properly applicable to the evidence of the defender, or which goes over entirely new ground, and in short is not a reply in the proper sense of the term, it would be reckoned an abuse of the privilege, and the Court would be entitled to check him in the practice, if systematically or unfairly attempted. In an important cause tried in England, instead of there being a long elaborate new speech from the leading Counsel, who has not previously spoken, and whose effort is therefore to be made in the reply, there is a reply in the proper sense of the term. I have heard the reply of the first Counsel in England, in a trial of great length and importance, limited to such observations as properly belong to a reply, or to comments upon the evidence of the defender. I am aware that there has been a feeling entertained, which, since it has been my lot to act as a senior, I have felt as fully and as strongly as other gentlemen in that situation, to allow the junior, as a privilege, and as likely to be of use to them, to open the cause; and there has been a great indisposition felt to do so invidious a thing as to take the opening out of the hands of the junior, it being considered that any opportunity of distinguishing himself in the cause is useful to him, though I think the practice not advantageous for junior Counsel. But so strong is my opinion of the importance of the senior Counsel opening the cause, with a view to the conduct of it, and of the injustice to the other party, that in any case of the Crown of importance in the Court of Exchequer, I have always thought it to be proper that the senior Counsel should open the case; and in these cases I have never felt the least difficulty (the responsibility being on the senior Counsel) in deviating from the common rule as to allowing the junior to open a cause, if of more than ordinary importance, though, no doubt, it would have been better done by him than by myself.

Has the present practice tended to prevent the defender's Counsel letting in evidence so as to exclude the reply?—I do not suppose Counsel would withhold from the Jury evidence which was *essentially necessary*; but there are cases unquestionably in which it has influenced the parties, if present, and the Counsel very considerably—perhaps the parties more than the Counsel. But it is impossible sometimes for the Counsel of the defender to undertake himself the responsibility of leading evidence, which he may think highly useful and important, and of giving a reply to the pursuer, when the agent and party, both present, particularly the party, say that they do not wish or desire evidence to be led, and say that they dread the reply, much more than they value the effect of the evidence to be adduced; and when the loss of the cause might be attributed wholly to the opportunity given to the leading Counsel for the pursuer to speak, by getting a reply. I believe, in one very important case, the importance of excluding the reply was a leading consideration with those acting for the defender, and did induce them not to lead evidence which they thought to be of the utmost importance.

If those alterations, which you consider to be an improvement, are adopted, is there any other change in the mode of conducting trials you would suggest?—No; I should like to see the plan followed in the Court of Justiciary tried in one or two cases as a mere matter of experiment in the administration of justice in civil cases. But that is a wish which I entertain as one may do in regard to many other matters, in which an experiment might be a source of interest to those whose minds may occasionally speculate on points connected with judicial establishments. I have no confidence that the course followed in the Court of Justiciary would answer in civil causes, though I believe that it is the opinion of some Counsel that it would. I think the Jury might in some cases understand the facts sufficiently as the evidence proceeds, without any opening. In many cases they could not. But I think that in the trial of civil causes, the Judge ought to be in possession of what the case is, because he cannot in presiding possibly know how he is to direct his views, unless he is put in possession of what the pursuer has to state; and there are cases in which, (and I trust it will in time be much oftener done than we are at present accustomed to in Jury Trials) when after the statement of a case on the part of the pursuer's Counsel, the Judge may be able to interfere, (though we have no nonsuit as in England) and put it to him whether he really conceives that the case is one on which he can hope to get the verdict of a Jury, supposing his statement to be proved, or may declare the law to be clearly against him, supposing his statement to be fully made out.

Is it your view that the case should be opened by the leading Counsel for the pursuer; and if there is a reply, that the leading Counsel should take that reply; and, in short, that the course pursued at *Nisi Prius* in England, should be implicitly followed here?—Most surely.

Is Mr. Solicitor General aware, that when the first draft of regulations for the conducting of causes in the Jury Court was made out in December 1815, before the first trial which took place the following year, it was precisely in the terms he has now stated?—Yes, I am quite aware of that.

Are you aware that it was at the particular desire of the Bar, that an alteration took place for the purpose of not excluding junior Counsel from having their opportunity of opening?—Yes, but it was before I came to the Bar, and have no knowledge personally of the matter. I have understood the matter to be as stated.

Do you conceive that the senior Counsel, by not having the duty cast upon him of preparing himself for opening the cause, may not always put himself so completely in possession of the case as he would do if it were known to be his duty, but leave the impression to be collected from the case as it goes on?—I certainly meant that to be collected as my opinion, though perhaps I did not wish to state it so directly. In the few Jury cases I was in before I had the honour of being Solicitor General, and in that way had precedence, I was so strongly impressed with the importance of the senior opening, that I never opened, I think, a case as a junior. The cases in which I was then concerned were not by any means so numerous that I should be likely to forget at present, if in any one instance I ever had opened in any case in which I was engaged as a junior. My impression at present is, that I never, as a junior, opened a case, having always considered the opening by the senior to be of much importance to the pursuer's interests.

Do you mean to include among the advantages you have stated of the regulation which you would prefer with regard to the conduct of causes at the time of trial, the tendency it would have to shorten trials?—Yes, it would of necessity greatly shorten the trial, both in leading the evidence and otherwise, because I do not consider that a reply, in point of propriety, could ever be any thing but strictly a reply, upon the evidence of the defender, or upon any material views which the Counsel for the defender may have taken. I am aware that the opinion I have now expressed may not be popular, but I believe it to be of much more real benefit to the practice of trial by Jury, than perhaps is generally considered here. It is an opinion I formed from attending trials in England, particularly on the Circuits. It may appear invidious to make the suggestion,—especially as in my own particular case, I am well aware that the duty will be much better done by the junior Counsel; but I thought it to be right to state my opinion, and I trust that it will not be ascribed to the slightest wish to interfere with the progress or opportunities of distinction of those from whom I have met with so much kindness and support.

Do you think there will be great opposition to this proposed change on the part of the Bar?—I think there are some regulations in regard to the conduct and despatch of business that ought to be adopted, without reference merely to opinions of that sort. I do not think they form a fair objection. I would wish to add, that I believe the desire expressed by the Bar, or some of the Bar, at the time when the regulations were framed, that the junior should be allowed to open, will not be found to be so strong, or so general now,—for universally, I believe, that the effect and detriment to the defender's case of an elaborate speech from the pursuer's Counsel in a reply is now felt and acknowledged to be most injurious and unfair; and it will be acknowledged and seen, that this evil, (amounting, in the opinion I believe of all, to positive injustice), can only be cured by allowing the senior Counsel to open, as well as to reply. I believe that, now the apprehension of the reply from the pursuer's senior Counsel is so strong, in every case, that there will be a general feeling that it is better to avoid that evil by the regulation that the senior Counsel of the pursuer shall both open and reply, than to continue a practice which necessarily leads to the inconvenience or injustice I have alluded to. I may likewise add, that the only difficulty now is, that in individual cases the senior cannot propose to take the matter out of a junior's hands. If a senior were in individual cases to take the opening into his own hands, it would be thought an invidious thing. He cannot propose it, but in many instances, I believe, the junior Counsel would be very well pleased if the senior were to say that he would open the case.

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You have stated, that you consider the union of the Jury Court with the Court of Session may soon take place; when do you think it could safely take place?—That is a question which depends very much upon one's views of what is required to be previously done. I am quite aware that, perhaps, those superintending the preparation of Issues, from their greater knowledge of the subject, and from their greater competency for that business, may think in regard to the matter of preparation, that more is still requisite to be done, than strikes those who are not so good judges of the matter, and who are not so conversant in the business. I believe that such progress has been made already, and at all events such progress will be made by the new arrangements that are about to take place, that I have no doubt whatever (although there might be some advantage in continuing the present system for a year or two,) that long before the period mentioned in the Act, and indeed now, the union may most safely take place. That is matter of opinion.

You have no doubt that before the period specified in the Act of Parliament, three years hence, the union could be safely accomplished?—Most unquestionably. In regard to any matters in the preparation for trial, of course the knowledge of Counsel, in regard to the progress which is making, must depend, in part, upon the individual cases he may know of, and upon what he may hear in the course of his professional intercourse, which may not be so accurate as what is possessed by those who are superintending the whole of the cases, and who must be aware of the difficulties better. But, on the other hand, the great anxiety of the latter in regard to the business, may lead them to think that more remains to be done than to the common apprehension or experience of the profession may appear really necessary. In my own opinion, matters are fully prepared for union.

Will you have the goodness to inform the Commissioners whether you have any doubt that the preparation which has been followed in the Jury Court has much contributed to mature the whole system?—Greatly—decidedly—and most beneficially.

Will you have the goodness to state, whether, if that mode of preparation were extended to the Court of Session; that is, if the two Courts were united, the same effect would not necessarily follow, and the same improvement speedily take place there?—Most undoubtedly. I do not suppose that the perfection of trial by Jury in Scotland is to be attained in the course of two or three years; because, for ought I know, it may not have attained absolute perfection in England. Of course, it will go on improving, and the Judges of the Court of Session (including even those now in the Jury Court) may have much to learn, long after it is supposed that the time is arrived for union, and even when it is considered to be in a very high state of perfection. I am quite confident, that all the purposes for which I conceive a separate tribunal was at first established, are now attained under the superintendence to which the Institution has been entrusted.

You are aware, that by the constitution of the Jury Court, one Judge may preside, or two Judges, or the whole Court may attend, but it is not compulsory for more than one to attend; by the Act of Sederunt, under such discretion, as the Court ought to exercise, they may order a trial before not less than three Judges, and that then their attendance is compulsory. Do you think there will be any advantage in making an alteration in that, or would you keep it in its present state?—I do not think that there would be any advantage in making a change in that respect, either now before the union with the Court of Session, or afterwards. When I first came to the Bar, and first attended trial by Jury, I had a feeling which was extremely natural at first, from adverting to the disposal of points of law in the Court of Session, before a number of Judges, with the opportunities of review, that it was advantageous that more Judges than one should sit upon the trial of the cause. I entertained that opinion very strongly; that opinion, however, undoubtedly, came to be altered by experience and observation. I think, in regard to the trial of civil causes, that there are many great and important advantages arising from one Judge, in general, conducting the trial of causes. There are a great many reasons on the other hand, undoubtedly, why both now and after the union takes place, in cases of difficulty and importance, other Judges should attend. It is of importance to accustom as many Judges as possible to trial by Jury, when they have not been appointed from a Bar, grown up under the administration of trial by Jury, and less accustomed to it before coming to the Bench, than they will afterwards be;—and also until the people are accustomed to trial by Jury as in England, as an ordinary part of the administration

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administration of justice, there may be an expediency in their not too frequently seeing the causes tried by one Judge alone. It is solely from these views that I think that there is any necessity of having more Judges than one present in any case. I think that some of the very advantages, which arise from one Counsel wholly conducting the cause, likewise arise from one Judge presiding at the trial of civil causes. And I think that that arrangement is of considerable importance, both with a view to the trial of the cause, and for forming greater habits for trying causes on the part of the presiding Judges in the Court, (whatever it may be), that tries the causes in Edinburgh, where the greatest number will always be tried. It will compel the presiding Judges to have their knowledge of points of law extremely ready and accurate, so as to be able to decide, not only with confidence to themselves, but so as to give satisfaction to the country, *e. g.* upon points of evidence which arise at the time of the trial. I think that it would lead to the presiding Judges feeling the necessity of directing their minds, with great zeal and ardour, to that as a duty, which requires the utmost possible preparation—great accuracy in regard to all points of law—great familiarity and knowledge in the application of principles, in order to give the country great confidence in the habits that would be so formed. For if a Judge were always to be assisted by others, and the opinion given at the trial did not rest upon his own responsibility, so that his individual character with the country would not be involved, he would be led to trust a great deal too much to the assistance he might thus receive. In England, I believe it is an observation commonly made, that the presiding Judge of the Courts has been considered to be generally the best trier of causes, in the Court; very much I understand from the greater responsibility which is thrown upon him, and the necessity of his greater attention to all points which are likely to arise, and to the manner of managing and conducting the trial of a cause.

Do you not consider, the Institution being in its infancy, that there would be advantage in having assistance?—No; except for the benefit of the other Judges themselves—to accustom them to see causes tried. I do not think it is advantageous for the mere trial of the cause.

Do you think the joint application, by the pursuer and defender, ought to lead to a trial taking place before more than one Judge?—I fairly say, the only difficulty I experience as to that is just this; it may not appear a very good principle for judicial arrangement, that the cases in which Judges are to attend should not be fixed. It may be thought, if more Judges than the presiding Judge attend in particular cases, that it is not a very correct principle for a judicial arrangement to proceed upon, in as much as previous bias may be suspected or imputed. It is a principle upon which, generally, I would not wish to see any regulation formed. But I think the probability is, that after the union, the presiding Judges will be more likely to err in applying for assistance, and other Judges will attend too often, rather than the reverse; and that there is no use therefore for any change.

Do you think the parties, in general, in this country, would not be more satisfied with an opinion upon a point of law, given by more than one Judge, than if it were given only by a single one?—At first, I had that opinion, as to the feelings likely to be entertained in the country; and if I thought that it would be as much borne out by experience, as I expected it would be, it would very much influence my opinion as to the *expediency* of an arrangement, which went to satisfy the parties whose causes are tried, and the country generally; but I do not think, in general, that the feeling alluded to does exist, or to any great degree. I have seen causes tried at Circuits by single Judges of the Court of Session, and I have not heard that feeling expressed. I believe, on the other hand, the feelings of parties, in most of these cases, are very much influenced by the opinions and expressions of Counsel at the time. I believe generally, even those who might have had a different opinion, now concur in the opinion I have stated. Generally, Counsel have seen the superior advantage of a case being tried by a single Judge. One is at first misled by thinking, that because a cause is of great importance, important points of law must necessarily occur in the course of the trial; that is not always the case. The direction to be given to the Jury in the charge, a Judge has, in this country, fortunately, always the opportunity of fully considering beforehand, as the record shows him to what questions he ought previously to direct his attention, so that for the charge, the assistance alluded to is not so important. Then again it is said, you never can tell what points will arise in the course of a cause; for in an unimportant case questions

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of law may occur. To that I would say, that if the question of law ruled by the Judge at the trial is of so much importance, as in the least degree to affect the decision of the cause, the party has his remedy, either if it is on a point of evidence, or a mis-direction of the Judge at the time of the trial. The objection to one Judge trying causes is, I uuderstand, this,—that as the points of law on which he may be called upon to give his opinion, cannot be so maturely considered as might be wished, it is right to give him the assistance of others. Now, on that very ground, I fairly own, I think it is far more expedient that you should take the opinion of the Judge, (if it is supposed to be less maturely formed, because given in the hurry of the trial, than it can be afterwards upon further consideration,) I would like better, I say, to take the opinion of the Judge to a Court, the members of which had not also expressed an opinion upon the point, decided, *ex hypothesi*, not on so mature consideration, as it may afterwards be upon subsequent argument. I think, if three Judges are sitting together in the trial of a cause, and decide a point of law according to a strong impression taken up at the moment, the review to the same Court is not so satisfactory as if you were taking a bill of exceptions against the decision of the point by one Judge, who of course will not wish to press his opinion too much against the other Judges, and who knows that he will have the opportunity of subsequent consideration, and of stating his opinion along with them.

Is it no hardship on the party in the suit to be obliged to have recourse to that mode of appeal, and to have all the expense and trouble, and probably a new trial, instead of having it decided deliberately in the first instance?—I think there are some sources of expense of that sort attending Jury trials, originating in the nature of the trial of Jury, which are not incidental to other modes of administering justice; but I think you will meet with few institutions, as a whole, where the sources of expense are less, if the institution is well adapted to its object, than what may be contemplated as incident to that mode of trial. Probably greater sources of expense are incident to other modes of administering justice,—in many cases far greater sources of expense—especially as to the manner of proof. But I think you must consider what is the best principle to go upon in the trial of causes, and not look to the mere question of expense or delay. At the same time it must be considered, that according to the principle upon which Jury Trial proceeds, it is always supposed that any point of law decided by the Jury Court in trying the cause, whether that Court is composed of one or three Judges, is to be reviewed; and that the Trial by Jury proceeds upon the principle, that, if points of law occur in the course of the trial, the opinion of the Court, whether consisting of one or more Judges, is given, and must be given, for the purpose of expediting the cause, from the necessity of determining the point when it arises in the case, and therefore, that the suitors are to apply to the Court again to reconsider that opinion, if the point is of such importance as to induce either party to do so. That mode of review is involved in any consistent or prudent scheme which could be framed for the trial of *civil* causes by Jury,—besides other reasons peculiar to the trial of *civil* causes. The principle of obtaining redress against erroneous opinions at the trial, by subsequent review, is then involved in the plan of trying civil causes by Jury; for it is considered that the opinion is one which is given in order to determine the case one way or another, so as to get on with the trial. I think it is better that points of that sort should be ruled by one Judge than by a number. The supposed objection, then, on the ground of expense or delay, must apply equally, whether the Court which tries the cause consists of one or more Judges.

Are the Commissioners to understand that you do not consider it necessary to allow the trial to proceed before more Judges than one, to reconcile the people of this country to it?—Not from my experience. No doubt that is a point on which every one forms an opinion according to his experience. Another benefit, and I consider a very great one, which will arise from individual Judges trying civil causes, is, that I think it has a great tendency to form and improve the judicial character in every possible way. I think there is no one single duty a man can have to perform to which so much responsibility attaches, and about which he will feel so much anxiety,—in which a man's character is so much at stake, and upon which depends so entirely the reputation he is to hold in the country, as that of trying causes in the presence of a Jury. On the manner also in which the duty is performed,—on the patience, temper, impartiality, attention to the province of the Jury, and knowledge of his own duty, which he evinces, will depend the influence his opinions will have with Juries. I think that responsibility is weakened and divided when there are more

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more Judges present. A Judge knows and feels, when he is sitting alone, that if he should be at all impatient, or hasty, or intemperate in the trial of the cause, the responsibility and blame is upon himself alone, and that the Jury will feel that the trial is not properly conducted, so as to enable them to do their duty; or that it is shortened, from a wish to hurry through the cause, so as to deprive them (who are trying but that individual case) of the full opportunity of considering it. I think that the devolution of the duty on one Judge imposes a great and a useful check upon all those feelings, which Judges must be more or less liable to, as well as all other men; but from which they ought to be, if possible, more exempt, or which they ought to be taught more habitually to restrain, by feeling strongly the responsibility of their situation. I am confident, that in every case where the Head of the Court has been entrusted with the duty of conducting the trial of causes, it has been one of the most engrossing objects of that Judge to improve and qualify himself for that duty. He knows his whole influence with the Jury depends upon the way and manner in which he discharges that duty; his character in the country depends upon it, and he gives up his mind to the object in a way he never would do, if he were to be assisted by other Judges, who would supply, by hints and prompting, assistance when there were difficulties in the evidence, and who would divide the responsibility of conducting the cause along with him, and when his defects in temper, knowledge or judicial habits will be supposed to be shared by the other Judges. One of the greatest collateral advantages attending the administration of justice by the aid of Jury Trial, if so important a result can be called a collateral benefit, is, in my humble opinion, the check which the Jury imposes on the Bench, and the influence which that check must always have in moulding the habits and character of the Judges, and thus influencing the spirit and character of the Law itself. The full benefit of that advantage is best secured, I am inclined to think, when one Judge tries. It may be said that the influence will thus be felt by fewer. I think not; for a standard of judicial character and habits will be formed from which none can well depart, without encountering the control of public opinion. Besides, in reality, in the greater proportion of cases, the difficulty of the questions that arise in the course of a trial, are not half so great as is commonly supposed. We know the questions of law that arise in the course of trial are chiefly upon points of evidence. No doubt the principles of the law of evidence are often very abstruse, and sometimes their application is a matter of great difficulty. In such cases it might be wished the points should be afterwards considered; nor is it intended that they should be finally disposed of by decision during the time of the trial. As to the direction of the Judge upon the law applicable to the case in charging the Jury, that is a point on which I have already said, that he has had an opportunity of previously resorting to authorities. As the case does not come out without his knowing any thing of it from the record; he is enabled to know generally the nature of the case; and it is his duty to make himself master of the branch of the law applicable to it. In the actual charge to the Jury, he cannot receive assistance from other Judges, even if present, except such as he may obtain by consultation with them before the trial closes, and that cannot be very satisfactory or minute. If the charge is wrong in point of law, I think the best way of putting the matter right, is not merely by what must necessarily be a hurried consultation with other Judges at the time of the trial, but by application to the reviewing Court, or the Court of which he is a member, to have the point more seriously considered afterwards.

Under the General Issue, are not questions of law more likely to occur than under Issues of specific facts?—I believe in general not. If the question is put with reference to Issues framed according to the former system, the object was to exhaust the whole matters of fact in dispute by specific questions. Of course, in trying that cause, every question of law that could possibly arise, truly fell within the province and duty of the Judge, as much as in the trial of a General Issue. In an action of wrongous imprisonment, for instance, according to the original system, a variety of questions might be stated; first, upon the allegations of the pursuer, then upon the allegations of the defender; then one or two Issues upon what were truly allegations of the pursuer in reply. The object was to exhaust every matter of fact that arose in that cause, otherwise the Issues were not sufficient in number, and could not embrace the points in dispute between the parties, or answer their end. Now, the whole cause would be tried by one General Issue,—under which you would be entitled to prove all the facts and allegations which formerly you would have been entitled to prove under specific Issues, but of course no more, so that the questions of law that

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can arise in such a case, tried on a General Issue, are the same in truth (and not more extensive or numerous) as those which arise upon trials of a number of specific Issues. For, before the General Issue was introduced, nothing more was left, in most instances at least, for the Jury Court to do than is left to them now, though the case was tried in a much less satisfactory manner, when split down into a number of special Issues on each part of the cause, and though certainly the benefit of Jury Trial was not fully obtained by such a system. Whatever direction in point of law was necessary to the disposal of the case, they were equally obliged to give as now; and bills of exception, and motions for new trials, took place just as they do now. The system of Issues on specific facts in a cause neither excluded the necessity of bills of exception when the party was dissatisfied, nor motions for new trials. The Judge was equally obliged to give the direction in point of law. No doubt he was often embarrassed in applying the law to the fact, in consequence of the Issues; and therein consisted one great objection to those Issues; for frequently it was impossible so to frame the Issue, as to meet what turned out to be the fact; or the terms of the Issues often excluded in a way which could not be foreseen, and was not intended in framing the Issues, the law necessary to be stated at the trial; and thus great embarrassment was experienced in applying the law to those Issues on specific facts, when the whole cause was properly a Jury question, and was intended to be tried, even in that defective system, as a Jury question. Then came the question how the verdict was to be framed, when there were a number of Issues on specific facts, and the Jury often returned contradictory answers to the Issues, from no inadequacy to perform their duty, but from the defects in the system under which they were directed to act. I do not believe that much more law is now left to the presiding Judge to state in the trial of a General Issue than formerly; and, at all events, not more than is essential for the trial of causes by Jury. Of course, the observation I make has reference to those cases in which the late Act did not make a difference, by sending appropriated cases to the Jury Court. I mean those cases in which the jurisdiction in reality remains in the Court of Session.

Why should there be an exception, as you propose, that in cases of difficulty and importance, the attendance of more Judges should take place, or be recommended under the rule and in the original?—I made that exception, solely with reference to the benefit likely to be derived by the other Judges who may attend, from opportunities of greater and more instructive experience. I do not believe, that, for the trial of the cause, it is of any great importance. At the same time, I think, at the commencement of an institution, such as the present, where the Judges have not all been trained at the Bar to the trial of civil causes by Jury, nor uniformly accustomed to that mode of trying matters of fact, it would be inexpedient, if they had not as many opportunities as possible of seeing the practice. I think, a good deal in point of principle, as to the best mode of trying causes, must be sacrificed for the importance of accustoming other Judges to try causes. On the other hand, there may be cases of greater importance, where the responsibility may so far exceed all the ordinary business which a Judge has to perform, that it would be right to give him assistance.

How would Judges acquire experience, in the trial of causes, unless that took place?—The Judges who have been on the Bench before the trial by Jury was introduced in Scotland, can only acquire experience in that way; and the oftener they attend upon their own account, and for their own improvement, the better. I would say, as matter of recommendation, that if the parties wish the attendance of other Judges, if there is really an application from the Counsel on both sides strongly urged, and if the case is of importance, that it will be a wise and proper principle for the Court to act on, that in such cases there should be other attendance; but I would not make it matter of regulation. I have no doubt the Courts will rather err in that way than otherwise. I have seen cases in the Jury Court where trials at Bar were ordered, when the Counsel were afterwards quite satisfied that there was no occasion for the attendance of more Judges, and had no objection to dispense with the attendance of the other two Judges.

You are not for making it compulsory that more than two Judges should attend, when both Counsel agree that it is of importance?—No; I see no necessity for such a regulation. I am satisfied that it will always take place, if the request is reasonable; but there may be many cases where application may be made by Counsel, in which I would not wish additional attendance to be prescribed.

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Mr. *Solicitor General.*

Do you contemplate Judges attending to the preparation of the cause, as well as the trial of it?—Until the system is better understood. Probably it would not be necessary for them afterwards to attend. If cases of difficulty did occur, I think it would be right and fitting; and where their opinion was asked. But, I would say, that that should be very much guided by subsequent experience after the union. If the preparing Ordinary and the Issue Clerks have any difficulty, and the Counsel are dissatisfied, it may be right that the opinion of the Judge, who is to try the cause, should be taken. I believe, in that matter, very little difficulty now ever occurs, except such as necessarily arises in the commencement of a new Institution. When it is rightly understood, I believe it will come to be a matter of ordinary practice. And, perhaps, the result may be, in time, that in some cases may be tried on an issue joined in the pleadings, and not prepared subsequently.

Would it not lead the Lord Ordinary to be more attentive to the course of proceeding if he were afterwards to attend the trial, and answer for the regularity of the proceeding?—It might have that effect undoubtedly. So far as the benefit to the Judges themselves is concerned, it will be observed, that I have already stated, the oftener they attend the better. I am only speaking now upon the principle of what is the best mode of trying the cause.

Are there any other suggestions which have occurred to you?—There is one other suggestion I wish to make. I do think it is of immense of importance that, some how or other, with a view to the trial of causes, that a rule analagous to the English nonsuit could be introduced, if the party cannot succeed in the actual state of the case; and also, that a pretty authoritative tone should be taken by the Judges at a trial of a cause in stopping it, when they see it cannot possibly go on, and that the case cannot be sustained at all. It may be difficult for the Judges so to interfere, and it is not always easy to say whether Counsel (though receiving the matter differently in the abstract) would be inclined, in individual cases, to acquiesce at once in such an intimation of the opinion of the Judge; at least, I am sensible that this observation might apply to myself. There may be difficulty in accomplishing the matter by the interference of Judges according to the latter mode. I think something like a nonsuit is necessary, in order to give us the full benefit of trials by Jury. I think trial by Jury is one of those things in which there is so much hazard, that the final issue of a case ought not to be irrevocably perilled on one single attempt to prove the case, when accident has prevented success, and that some remedy similar to what I understand a nonsuit in England to be, should be introduced. A case may unexpectedly fail in proof from accidental circumstances peculiar to the trial at the *time* of trial. For instance, from the accidental absence of witnesses, though the party may not wish to put off the cause, or he may be deceived as to the importance of the witnesses he has in attendance; and there are many other hazards and contingencies attending trial by Jury, which are so great, that unless you allow a form like the nonsuit as a remedy for those contingencies, you are hazarding more than ought to be hazarded in the administration of justice upon one trial, and running a great risk of miscarriage in the attainment of a just and true investigation of a case. I should say, that that which has been found to be a great benefit in England, experience might embolden us to introduce, or at least to try, without, however, some accompanying rules respecting nonsuits, which, I believe, English Lawyers concur in condemning. Upon the general point stated in the last question to me, I would wish to be allowed to add this, as to trials being conducted by one Judge. I think it may contribute to this result, viz. that the expediency would be very much seen (after the trial by Jury was united to the Court of Session) in many cases of the facts being found by special verdicts, when they can be adjusted, the more extensive use of which I think will be a very beneficial and safe mode of trying questions of law; judging, at least, from experience in the Exchequer, where we adjust special verdicts with very little difficulty indeed, and where the question of law is tried with more benefit than it can be done in any other way. My own observation leads me to think, that special verdicts, in cases where they can be had, is one of the best modes of settling the questions of law which the case may involve. We resort to special verdicts very generally in the Crown cases in Exchequer, with the entire concurrence of both sides of the Bar; and I know no greater or more satisfactory manner of raising a question of law for the Court.

Do you think it would lead more frequently to special verdicts being framed, if cases where tried by one Judge, rather than by more?—Yes, I do.

No. VIII.

Edinburgh, Saturday, February 3, 1827.

The Right Honourable the LORD PRESIDENT in the Chair.

James Jollie, Esq. Writer to the Signet, a Member of the Commission; Examined.

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Mr. *Jollie.*

HAVE you had considerable practice in the Jury Court?—I have had some trials there of very considerable importance.

Have you had an opportunity of being well acquainted with the proceedings there?—Yes, I have.

Were you perfectly satisfied with the conduct of the Juries in those cases from what you saw?—I was perfectly satisfied with the attention the Juries paid to causes before them, which was very great indeed; and likewise with the intelligence which was displayed by them.

Have you attended to the evidence that has been given to the Commission by Mr. Clerk and Mr. Murray, Clerks of the Issues, and Mr. Russell, Clerk of the Jury Court in the Register House?—Yes. I was present when those three gentlemen were examined, and I have seen their evidence in print.

You are aware several suggestions are contained in their evidence as to the further improvement of the system of Jury Court Trials, by making it more generally understood?—Yes, I am.

Do you concur generally in the suggestions those gentlemen have given?—Perfectly so. I think if their suggestions were adopted, they would become very great improvements, and make the system more generally acceptable to the profession at large.

Has it occurred to you that there are any further improvements that might be introduced?—I heard with great satisfaction the suggestions which were made by Mr. Solicitor General, at the last examination, with respect to the mode of conducting verbal pleadings before Juries, and with which I entirely concur. I think, that if some alteration were made with respect to the mode in which Counsel are heard, it would be a considerable improvement; and I think the suggestions of the Solicitor General lead to that object. I mean to say, that giving the reply to the pursuer's Counsel, in the present mode, in my humble opinion affords considerable advantages to him over the defender; and, I think, that what was suggested by the Solicitor General would tend to remedy the evil.

Are there any other suggestions in regard to the mode of conducting business in the Jury Court which you wish to mention?—I concur entirely in the suggestions mentioned on former examinations, and nothing additional occurs to me on the subject. The printing of condescendences and answers; the union of the two rolls, the hand-roll and the preparation roll, will contribute very materially to improve the proceedings.

Do you also approve of the suggestion in regard to enforcing the tender of Issues, in order to allow the practice to be more generally understood?—Yes, I do. I think that what is proposed in making the parties bring forward their own Issues, will tend very much to the diffusion of the knowledge of the proper mode of preparing them.

Keeping in view the assistance to be derived from the two Issue Clerks, do you think there will be any material difficulty in uniting the jurisdiction of the Jury Court with the Court of Session at the period fixed by the Act of Parliament, or thereabouts?—I am inclined to think, that the uniting of the jurisdictions will be a very great advantage.

Do you think there will be any material difficulty in uniting the two jurisdictions?—I see none at the period mentioned. Indeed my own impression is, though I only give it as such, that the sooner the two courts are united the better; always keeping in view the aid and assistance which are to be got from the present Clerks, and especially from the distinguished Judge, who has done so much to reconcile the country

country to that system of trial; and to whom, I think, the country is under very deep obligations.

Do you consider that any sort of prejudices, which may have been entertained against Jury Trials, have been greatly removed by the progress already made in the system?—Yes, greatly removed; and I attribute this very much to the able Judges who have conducted the business of the Jury Court? and, in an especial manner, to the unremitting attention bestowed by the Lord Chief Commissioner in the exercise of his duties; and the urbanity which the Members of the profession have experienced from him in the discharge of their's.

Do you think, that if the system were adopted of printing the condescendences and answers, and making those regulations that have been so frequently talked of, in order to get them in a shape to be more easily read, and consequently more easily amended, it would either add materially to the expense or the delay of causes?—It may add a little to the expense; but, in my humble opinion, this is not to be thought of for a moment, when put in competition with the advantages that must be derived from it. I think it will have the effect of making the framing of condescendences and answers more correct, and the parties themselves more anxious that they should be so.

You do not think that alteration will meet with opposition from the profession?—My opinion is, it will not, when these different circumstances are considered.

If the effect that is expected from such a regulation be successful, will it not then tend very much to the diminution of expense, and the saving of time?—I think it will, upon the whole, tend to both.

Will the expense, to which parties will be put in printing condescendences and answers prepared by the Jury Court, be more than they are put to in the Court of Session, when a case goes to the Inner House?—No; I should think it would not occasion more expense.

Is it consistent with your knowledge, that in regard to cases that are before the Ordinaries in the Outer House, which it is supposed will proceed to the Inner House, it has become the practice to print condescendences and answers?—I am not aware of such practice.

You have been present at the preparation of several Issues in the Chambers, and you are acquainted with the way in which they were conducted formerly before the last Act of Parliament?—Yes, in the cases which were under my charge.

Has anything occurred to you which could be put in practice now to save expense in that part of the proceeding?—I have attended to different improvements that have been suggested, and they appear to me to be not only well contrived to accomplish the work, but likewise to do it in a more speedy and less expensive manner, than at present.

The Issues at present being finally settled at Chambers, and the Record being closed before one of the Judges of the Court, generally the Lord Chief Commissioner, so that Counsel who are attending know the principle on which the Issues are settled, though it is never extended further; it has occurred that the attendance of Counsel in that way should not be given up, at least, not at present; because such a mode of conference brings the Issue with a right understanding, and quietly to a perfect shape, and to perfect correctness in wording. But it does not extend the knowledge of the principle upon which Issues are settled, so that an acquaintance with the rules and principles which govern Issues is confined to a small number of persons in conversation. Do you think it would be a beneficial step, after that proceeding, instead of closing the Record, and certifying the Issue at the table in Chambers, that on the next day the Court meets, the Issue should be taken there, and the Judge state the grounds publicly on which the Issue is settled, for the purpose of disseminating the practice among the profession?—I am decidedly of opinion, that the preparation of Issues in the way that is followed is the best way in which it can be done; but, at the same time, there is no doubt that mentioning from the Bench the following day the principle on which they have been framed, will have a greater effect in diffusing the knowledge of the mode of preparing Issues, than by its being done only in Chambers.

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Mr. *Jollie.*

Do you think that there would be any ground or reason for complaint by the practising part of the profession, of any expense this would add to the proceeding? —I am not aware the expense could be great; and I am satisfied a material advantage must arise from it by the diffusion of the knowledge of the preparation of Issues, and by an explanation of the principles on which they have been framed.

No. IX.

JURY COURT COMMISSION.

Requisition on the Lord Chief Commissioner.

Extract from the Minutes of the Meeting of the 24th January 1827.

THE Clerk was directed to lay before the Lord Chief Commissioner the following Requisition, viz.

" With reference to the second article of the Instructions, and particularly to the last part thereof, the Commissioners wish to avail themselves of the Lord Chief Commissioner's experience on the subject of their inquiry, (his Lordship having presided as Chief Judge of the Jury Court from its commencement in January 1816 to the present time,) and they therefore desire that his Lordship, as one of their number, will state to them,—

First, At what time it appears to him that it will be safe and advisable to unite Trial by Jury in Civil Causes with the Administration of Justice in the Court of Session.

Secondly, What his Lordship considers to be the best mode of connecting, with the jurisdiction of the Court of Session, the Preparation of Causes for Trial,—the Adjustment of Issues,—the Proceedings on Motions,—the Trial of Causes,—and those Proceedings which take place after Verdict.

Thirdly, What changes his Lordship considers to be necessary in the Forms of Proceeding in the Jury Court, as now constituted, with a view to remove imperfections, and to extend the knowledge of the system."

To which Requisition your Lordship will please attend.

C. Neaves.

Edinburgh, 24th January 1827.

To the Right Honourable the Lord Chief Commissioner.

STATEMENT by the Lord Chief Commissioner, in conformity to the Requisition of the other Members of the Commission, &c.

IF the statement which I am to make at the desire of the other Commissioners had been intended for the members of the Commission only, much of what I shall put down might have been taken for granted, as being within their knowledge. But more minute detail is required, to enable those who are entire strangers to the Institution, and who are necessarily ignorant of what have been the means and modes of acting, in the various branches of the Jury Court Jurisdiction, to form a correct judgment on the subject.

Instead of pursuing that order which the commencement, the progress, and conclusion of an action suggests, as the natural course of statement, I shall take first in order, those parts of the Institution which are so far matured, as to leave no measure of improvement to be taken, because there is no defect to be remedied. All that is necessary is care and attention on the part of those in whom the Jurisdiction shall be placed, to secure against any falling off. I shall place last in order, those branches of the system which are less or more in a state to require farther improvement. By this course, the mind will be at once relieved from any thought or consideration, on a very large and important portion of matter, and attention be directed more pointedly,

pointedly, and without interruption, to that branch of the subject, which must be more matured before union is safe and advisable.

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JURIES.

The conduct of Juries has been distinguished for intelligence, attention, and integrity. The constitution on which they are formed, viz. being in number twelve, and that they must be agreed in their verdict, has operated successfully, and without any of the apprehensions which were entertained as to those regulations, at the commencement of the Institution, having been realised.

It is not out of place to observe, here, that the Juries have been aided very materially by a very simple regulation, viz. the having printed copies of the Issues put into their hands before the case is opened. This was absolutely necessary when the Issues consisted of specific fact, and were often very numerous.—Where there are two or more General Issues on the points of the cause, it is very serviceable; and even where the cause is tried on a short General Issue, it is important, by fixing the mind of the Jury to the evidence of the witnesses and the directions of the Judge as applicable to the Issue. I mention this now, to secure against the practice being let down.

PRESIDING OVER JURIES.

By the constitution of the Jury Court, according to the 55th of Geo. III. c. 42, no more than one Judge has been required to preside at a Trial. The attendance of a greater number is provided for by an Act of Sederunt, 29th November 1825. The Court is thereby enabled, in its discretion, in cases of magnitude and difficulty, to order an attendance of not less than three Judges; and the parties may apply for such an attendance.

From the commencement of the Institution, 16th January 1816, (when the first cause was tried,) to this time, two-thirds of the causes tried have been before one Judge. I have not heard of any complaint of those regulations for presiding over Juries in civil causes. I do not consider it to be necessary to enter into any argument on this subject at present.

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THE LAW OF EVIDENCE.

I may venture to state, that although it required great attention to administer the law of evidence as regulated in this country, it has been faithfully administered in the trial of Civil Causes in the Jury Court, and that it has been inculcated on motions for new trials, invariably since the Jury Court has had jurisdiction over new trials.

Some questions on the law of evidence, according to the rules which govern the admissibility of witnesses in Scotland, have been taken to the Court of Session on bills of exception, particularly as to the admissibility of persons disqualified by their situation, but proposed to be examined on the ground of there being a *penuria testium*. I believe I may say, generally, that the judgments on the Bills of Exception have confirmed what was done at the trial. In order that the Commissioners may become more completely possessed of this part of the inquiry, I refer them to the reported cases.

Murray's Reports. See Index—Title, Evidence and Witnesses.

Having stated that the law of evidence, as it exists in Scotland, has been strictly adhered to, I have to add, that, enforcing it in those particulars in which it differs from the law of England, has not impeded the due administration of justice in Trial by Jury. One mode of practice, however, may be mentioned, as having been not only inconvenient but prejudicial, viz. not having been at liberty to cross-examine except by questions cross to those put in chief. The alterations of the law which took place in 1819, has been attended with the very best effect.

Just before the statute passed, which removed this inconvenient practice, there was an indication in one case to *protest for reprobators*. A regulation of the Law of Scotland, which, if it were enforced, would defeat the proceeding in the trial. The proposal was abandoned, on a hint from the Court, and has never once been resumed. Indeed, the power to cross-examine has answered every purpose; and I feel great satisfaction in mentioning that this power has been exercised with great judgment and effect by the Scottish Bar, without the least tendency to abuse it.

Another practice connected with the Law of Evidence has been altered by the Legislature, the delivering lists of witnesses. The abolition of this practice was recommended by the last Commission; and the abusive use that had been made of those lists, led me strongly to enforce the recommendation. I find, however, that

THE LAW OF EVIDENCE.

there are opinions the other way, particularly at the Bar, by persons so highly respectable, that I am very desirous that the subject should be re-considered.

There are (in addition to those mentioned) other positive regulations of the Law of Scotland respecting evidence, which vary from what prevails in England.

As the Institution of trying Civil Causes by Jury was borrowed from England and as the English law of evidence has been in many particulars formed by, and is intimately interwoven with the system of Trial by Jury, it was to be feared that those variances would have affected the trials of Issues in this country. But I can say, upon full experience, that neither the rule requiring two witnesses—nor excluding a numerous class of persons as being within certain degrees of relationship, from being witnesses—nor excluding Agents—nor excluding persons who have had any thing to do in preparing the cause—nor admitting what a person who is dead has reported, to aid in evidence of a fact—nor admitting the oath of the party, in certain cases, to fix damages—nor the oath of verity or reference, nor the oath *ad litem*—have broken in upon Trial of Civil Causes by Jury.

I have great satisfaction in stating now, what I ventured to announce in 1819, that the Law of Evidence, generally, has been perfecting, and the technical and fixed maxims of that of Scotland, has not been trenched upon or shaken.

As to the law of evidence, generally, there have been many important questions agitated and settled. There has, I hope, never been any check to the most free discussion at the Bar on these, or on any point; or any disinclination to have opinions of the Court reviewed; and there have been suggestions readily made from the Bench, at trials, to promote whatever was deemed requisite to the establishment of a sound system of trying Civil Causes.

It may be as well to take this occasion to observe, that there has been every endeavour to adhere to the law of Scotland in directing on the law from the Bench, in the Jury Court; and a reference to the reported cases will best shew whether the endeavours have been successful.

MOTIONS.

The ordinary motions have proceeded in general without impediment; but at times questions on ordinary motions have arisen, when I have been desirous of the attendance of other Judges. This has created delay, and some expense, which it is desirable to avoid. Among motions of this description, applications for productions by the party, or by havers, strangers to the party, may be mentioned. It happens often that very nice and difficult questions, both as to right and discretion, arise on this head of motions.

There are many of the motions for re-transmissions to the Court of Session, which require consideration. The return made to the Commission by the Jury Court Clerks sets forth the cases which have been re-transmitted by the Jury Court to the Court of Session, for want of Jurisdiction, and other Causes in the Jury Court. It is fit that the Commissioners should pay particular attention to the list, in order to decide what should be done with the cases contained in it, in part or in whole. There is one article which I cannot forbear selecting, Re-transmission to have law and relevancy decided before trial. Inconvenience and unnecessary delay has arisen, by such cases going back to the Lord Ordinary, and thence at a great distance of time to the Division.

NEW TRIALS.

Although motions for new trials, by taking place after verdict, do not fall naturally under this part of the statement, it is better, upon the whole, to discuss them here.

The Statute 59 Geo. III. gave the jurisdiction over New Trials to the Jury Court, and requires the attendance of three Judges in all proceedings on those motions. There are frequent disappointments and adjournments by not having a full Court upon the application for the rule to shew cause why there should not be a new trial, and arrangements for special appointments are throughout required to secure a full Court for all proceedings on that part of the jurisdiction.

I may venture to say, that since the Jury Court has been vested with authority to decide on motions for new trial, the great principles which regulate in that important part of the Institution of Trial by Jury have been deliberately weighed and considered, are now well established, and perfectly understood by the Bar. When the error of the Judge has been the subject of correction, there has been a liberal and ready investigation into the mistake complained of. When the error of Juries has

NEW TRIALS.

has been the cause of the application, there has been every desire to support the verdict. But when the impression has been, that the conclusion of the Jury was against the real justice of the case, or that they had omitted giving due consideration to any prominent point of evidence which should have weighed with them in considering their verdict, the Court has not hesitated to exercise that sound discretion, which must always be an ingredient in the determination of a Court, when called upon to set aside a verdict on account of the error of the Jury.

It would be easy to establish this by many instances; but I shall confine myself to two cases in Mr. Murray's Reports.

2d Murray's Reports, 584.
3d Murray's Reports, 461.

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IT IS UNNECESSARY to enforce, that in a Court where the dispensation of justice proceeds by the intervention of a Jury, the great end of the Institution can only be accomplished by a sound system of Issues, expressed with perfect correctness; and as the Issues are founded on the averments of the parties, every effort should be made to bring those averments to that state of precision, which will serve as an unerring foundation for the Issues that are to be extracted from them.

It will be necessary, in entering on this part of the subject, to refer shortly to the Institution in its commencement, and to trace it onwards Such a deduction will be substantially useful in considering the great questions on which the Commission is to report; as it will demonstrate that the experience which has been acquired, and the extent to which the principles of the system are now understood and acknowledged, insures, in a comparatively short period, the attainment of sufficient perfectness in the preparation of Causes and adjustment of Issues.

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FIRST PERIOD OF THE JURY COURT.

The Act of Parliament passed in 1808, concerning the administration of Justice in Scotland, contained a clause empowering His Majesty to appoint Commissioners to inquire, "Whether it would be for the utility of the Subjects within Scotland, that Jury Trial should be introduced into the Proceedings of the Court of Session, and in what manner and form the same would be most usefully established."

See the Third Report of the Comsioners, presented to His Majesty and to Parliament in 1810.

The Commissioners reported by a majority of their number, "That under proper regulations it might be for the utility of the Subjects within Scotland, to introduce it to a certain extent by conferring on the Court of Session, as *now* divided, a power to direct an ISSUE to be tried in any cause upon a question or questions of fact."

The opinion of persons of the highest authority in the law of this country concurred in this suggestion: and supposing that the Issues directed by the Court of Chancery in England were Issues of specific fact, it was proposed to imitate that example*.

By the Act of the 55th of George the III. c. 42, which created the Jury of Court, it is enacted, "That either Division of the Court of Session might, in all "Cases in which matters of fact are to be proved, direct SUCH Issues as may "appear to them expedient, to be tried by Jury."

Thus it was left open for the Court of Session to direct Issues of specific fact. But no particular form of constructing the Issues had at any time been suggested; so that the mere form of stating the question to be tried, was matter of great difficulty and of serious thought. The most eminent Lawyers and Judges were at a loss upon the subject. And "The late Lord Meadowbank, at that time a Judge of the Jury Court, who had lent his powerful and discriminating mind very particularly to the subject of Trial by Jury in Civil Causes, and had weighed this matter in all aspects with great anxiety and diligence, had great difficulty on this part of the Institution. In the course of my communications with him, he suggested submitting Condescendences and Answers to the Jury, to find all the facts there averred, (according to the proof), as the only means of separating the law from the fact with safety and certainty."

This Passage is taken from a paper which I drew up in 1819, and presented to the Commissioners in 1823.

After full consideration, however, it was thought advisable not to let the Issues between the parties rest on their adverse pleas and averments as they stood in process, but to convert the matter in Issue into the form of a question or questions, as

See Douglas's Rep. p. 259—the case of Sir R. Hotham v. East India Co. and 1st vol. Term. Rep. p. 338. the Earl of Bute v. Grinda

* The Lord Chancellor says, in Lord Lyle's case, (stating the General Issue), this is the sort of Issue that a Court of Equity in this country would direct.

FIRST PERIOD OF THE JURY COURT.

as the most simple and intelligible plan that could be adopted. This is sanctioned by what appears to have been done, in some instances, in the Courts of Common Law in England. It was soon found to answer in practice, and it has continued, invariably, to be the form, since the commencement of the Institution, to join Issue in the Jury Court, by putting the matter to be tried in the shape of a question*.

See Act of Sederunt, December 1815, and Rules and Regulations for the Jury Court, December 1815.

To enable the Court of Session to proceed in the new duty of directing Issues, assistance was provided from the Jury Court establishment. The first Clerk of the Jury Court was directed, by the interlocutor of the Lord Ordinary, to prepare the Scheme of Issues; which, after his approval, he reported to the Inner House for its sanction. The Jury Court Clerk was authorized to have recourse to me in private discussion.

It was understood, as has been observed, that, in this stage of the Institution, the Issues were to be of specific facts; and it was my duty to assist with my advice in that frame of Issue. This duty I endeavoured to perform strictly; but not without an anxious desire, on my part, that the General Issue should be gradually introduced.

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SECOND PERIOD OF THE JURY COURT.

The Statute of the 59th Geo. III. c. 35, appropriated certain Causes to the Jury Court, with complete authority over the preparation in all its stages. It likewise enabled the Court of Session to remit Causes, *entire*, to be dealt with by the Jury Court in the same manner.

From the same paper from which the extract inserted in the preceding page is taken.

In order to remove some incorrect impressions as to this Act of Parliament, which were likely to prove prejudicial to the Institution, I drew up a statement in June 1819, which I printed and distributed. I presented that paper to the Commissioners in 1823, and it forms, with my name to it, a number in the Appendix to their Report. I anxiously pressed in practice the use of the General Issue, and instead of Issues of specific facts, to use Issues on the points of the cause. In March 1820, in a cause of five Issues, on a question of Insurance, I stated from the Bench, that "I hoped the time would come, when such cases would be tried on a General Issue; and the evil of omitting to put a paritcular fact in Issue be avoided." I was thus in the course of cautiously endeavouring to take the professional mind along with me, on this important change, when the doctrine delivered in the House of Lords in the Session of 1823, gave an effectual impulse to the General Issue†.

But the habit which we had all contracted was not to be easily got rid of. A new and opposite process of the mind was to take place, and a correct technical form of expression was to be settled for the various cases which admit of the General Issue. Such a transition, when most important interests are concerned, calls for much thought in preparation, and much accuracy in execution, and much deliberation in enforcing.

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THIRD PERIOD OF THE JURY COURT.

But proper means of enforcing the system did not take place until the 6th of Geo. IV. carried the Report of the Commissioners into effect.

In order, however, to give effectual operation to this Act of Parliament, much remains to be done. For when, in obedience to the Statute, the Act of Sederunt for the Jury Court was drawn up (in *November* 1825,) the great and inconvenient distance of the Court Room and Chambers of the Jury Court from the Court of Session, and the impossibility of the junior Judges of the Jury Court (who are likewise Lords Ordinary of the Court of Session) leaving their duties in that Court, rendered it impossible for them to act with me in preparation of causes, and on motions and debates. The junior Judges of the Jury Court were, therefore, directed by the Act of Sederunt to perform the first part of preparation of Jury Court causes in the Outer House of the Court of Session; an arrangement which admitted of their resuming their duties of Lords Ordinary in the business of the Court of Session, without delay or inconvenience.

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* *I received great aid as to this form of an Issue from a statement made by Lord Ellenborough, when the Act of Parliament* 1815 *was depending in the House of Lords, and from conversation with him; and likewise from the manner in which Issues are often stated in Briefs for the instruction of Counsel.*

† At the time of the first Trial of the Earl of Fife's Case, I mentioned the Issue of *Devisavit vel non*, as the Issue appropriate to the cause. It would be sufficient to state this on my own memory, but the Report to Parliament of the proceedings of the Jury Court confirms my recollection.

THIRD PERIOD OF THE JURY COURT.

In the Jury Court causes, their business was to order condescendences original and revised, answers and notes of pleas in law; and when the case was so far advanced, they were directed, by the Act of Sederunt, to order it to a Roll, called the Jury Court Preparation Roll, without closing the record.

This Roll was instituted to put the adjustment of Issues under my superintendence, as the Judge of the Jury Court, who was acquainted with that part of the system; a branch of the Institution, the practice of which had not yet been extended to these other Judges. Such has hitherto been the divided state of the Jury Court, in the important business of preparation of causes, and adjustment of Issues.

The Causes being transferred to the Preparation Roll without the Record being closed, it is competent to make such orders as may be necessary for amendment of the Summons and Defences, and of Condescendences and Answers.

To secure, in the best manner, the very beneficial aid of the Clerks of the Issues, according to the plan of preparation which has been hitherto used in the Jury Court, with so much advantage, the first step of proceeding, under the Preparation Roll, is to summon the Agents with Counsel to attend the Clerks of the Issues, and if they have Issues prepared to bring them.

Before this notice is sent, the Clerks of the Issues have made themselves masters of the process to which the notice relates; and if any nice question seems likely to arise, in settling the Issue, they confer with me, the better to enable them to hold communication with the Counsel or Agents on the scheme of the Issues proper for Trial.

By personal communication and conference between the Counsel and Issue Clerks, the schemes of the Issues are made, (if I may so express it), the touchstone to ascertain the correctness of the Summons and Defences, of the Condescendences and Answers, and Notes of Pleas in Law. If these require to be amended, the amendment is ordered by an Interlocutor signed by me, and the proper course for correction is followed out.

The case being thus brought into a state of preparation, as to the frame and expression of the Issues, and as to the precision of the averments and Pleas in Law by which the Issues are supported, so as to satisfy the Counsel of the parties, and the Clerks of the Issues, that they are fit to be submitted to the consideration of the Chief Commissioner, or other Judge of the Jury Court, the draft of the proposed Issues, together with the whole process and productions, are sent to me.

By the operation which has been performed in the office of the Clerks of the Issues, my attention is readily and most usefully directed to clear and distinct points.

My course is to consider the process in all its parts, with reference to the Drafts of the Issues. If, on this examination, I find no alteration to be necessary, I return the Process and Drafts with a mark, signifying that the Issues are proper for the Trial of the Cause.

When they appear to me to require correction, and that the correction is no more than the change of a word or expression, I put my corrections on the margin of the Draft. If they are more extensive, I put them on a separate paper, and frequently put in writing my reasons for the alterations. I then return the Process and Drafts of Issues, and Notes of alterations to the Issue Clerks; and when the subject requires it (which has happened very frequently), I confer fully with the Clerks on the principle, the frame and expression of the Issues, for the double purpose of settling the Issue best calculated to try the particular Cause, and of advancing the general improvement of the system.

When by these means the Issues proper for the Trial of the Cause are brought into such a shape, as to be fit for consideration with the Counsel, a notice is sent to the Agents to attend me at my Chambers in the Jury Court, with Counsel on both sides.

My discussion with the Counsel in this stage is in the nature of conversation, as much better calculated to serve the object of settling Issues, with precision, than formal and contentious argument at the Bar, and deliverance from the Bench.

When the Issues by this quiet course of proceeding are brought, in point of frame and expression, to be proper for the Trial of the Cause, I certify that they are so, by an indorsement on the Draft of the Issue, dating the indorsement.

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The Issue thus certified lies over for ten days, in obedience to the 34th Section of the Statute which gives the parties that period to propose alterations, in which the Court, if required, are to hear Counsel at the Bar. Sometimes parties consent to have the Issues engrossed and signed as soon as they are finally settled, for which there is a form.

At the time the Issue is certified, the Record is closed and authenticated according to a Form, unless upon the application of parties, it is kept open to admit of the production of writings. But this is seldom required, as that object is attainable by a signed consent. If no application is made within ten days for altering the Issues, they are engrossed by my order.

After the Issue is engrossed, a day is fixed for reading the engrossment in open Court, of which the parties have notice, and may appear in Court to apply for alterations till the reading is closed.

I next sign and date the engrossed Issue, which is then transferred to the Jury Court Office in the Register House with the Process, there to be ready for Notice of Trial.

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GENERAL OBSERVATIONS.

It will tend to secure against misconception and mis-statement, if I preface what I have to say on the preparation of Causes and adjusting Issues, by observing, that in preparing Causes by Condescendences and Answers, (provided the correctness of the averments in those legal instruments is rigidly enforced), the best possible security is afforded to the interest of suitors, and the trial of Causes, under General Issues, is rendered, in all cases to which that Issue can be made applicable, safe and beneficial.

An Issue consis s of an averment, and a denial of that averment. First, it may be joined on a specific fact or facts,—*secondly*, it may be joined on the point or points in the cause,—*thirdly*, it may be joined on the general question embracing the whole cause. In discussions on the Jury Court proceedings, and in the practice of preparation, the *first* of these has been denominated Issues of specific fact,—the *second*, Issues on point or the points of the cause,—the *third*, the General Issue.

Instead of leaving Issues on the respective averments of parties, the Issues used in the Jury Court are framed, (as has been observed,) by converting the adverse averments into a question.

Those questions were, during the *first period* of the Jury Court, questions of specific fact;—at the outset of the *second period*, they began to assume the form of Issues on the point or points of the cause; and latterly the General Issue has been settled in certain cases. This progress to improvement has been gradual: and as in gradual improvements, a distinct line of separation cannot be drawn, so it was here. Accordingly the Issues, for a certain time, partook of a mixed character; and this was the interval of the greatest difficulty in the trial of causes. This will appear by examining the Issues in Mr. Murray's Reports. To insert instances would load the statement.

Among the useful features of the General Issue is its comprehensiveness. Points are raised under it, with the great advantage of having proof of the fact at the time that the questions of law connected with it arise. So that the Judge, by discharging his duty in directing the Jury on the law, does so at the best possible time, and if the statement of the law is thought erroneous, the means is afforded, at the best time, and in the best mode, to put the legal rights of the parties in the best possible course to be deliberately ascertained. It secures the whole question (between the parties) being disposed of. It secures against risk of verdicts of *not proven*, and leads to verdicts on which judgment must follow, as of course, (if the verdicts stand good), without further litigation in any other Court. It secures against inconsistent and repugnant findings. It relieves from inextricable and injurious questions as to expenses where Issues are numerous, and found, some for the pursuer, and some for the defender.

The inconvenience incident to the General Issue is, that it may not disclose, of itself, (with a particularity sufficient for the security of justice), the actual grounds of demands or defence. It may give rise to surprise by its generality, and admit of artful management subverting justice.

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GENERAL OBSERVATIONS.

In order to inculcate the right understanding, and proper use of the General Issue, it is material to impress on the mind what may appear, perhaps, too plain a proposition to be insisted on, *namely*, That the natural order of an action is for the pursuer to aver all the grounds of his demand, and for the defender to deny; so that the Issue may be said to consist of the averment or averments of the pursuer, and the simple denial of the defender. But in the consideration of framing a General Issue, it must always be attended to, that there are many actions in which, upon their first entrance into Court, the question arises out of a simple demand upon the part of the pursuer, and complex averments on the part of the defender, calculated to avoid the demand.

Reductions may be given as an illustration of the first, where the pursuer avers that the deed was obtained by fraud—was executed by a person of unsound mind—was not executed according to the formalities of the statutes—and the like.

Maritime Insurance may be given as an instance of the second. The pursuer simply avers the execution of the policy, and the loss; the defender denies the liability, averring that the ship was not sea-worthy—that she deviated from the voyage insured—that the master exercised an unsound discretion—and the like.

The first consideration, therefore, in preparing an Issue, after examining the summons and defences, is, to get the averments, (if they are not sufficient in the summons and defences), extended, so that it may be judged whether it is a case in which the simple denial comes from the defender, or one in which avoidances are set up by the defender, and denied by the pursuer. By sufficient attention being paid to the preparation of averments, by their being confined strictly to fact, and hypothetical conclusions or inferential propositions, from facts being excluded, the mischiefs which have been remarked as incident to the General Issue are secured against.

What is wanting in practice, at present, is having the mind readily turned to the consideration of a General Issue, from which ever side the averments arise; and distinguishing thereby that the matter averred by the defender, to get free of the demand upon him, does not require a counter Issue or Issues, but is completely covered by the General Issue. The unreadiness in this application of the mind to the subject in this view of it, is one of the features which I had before me, when I said in a former part of this paper, "That the habit which we had all contracted "was not to be easily got rid of, and a new process of the mind must take place "in forming the General Issue."

No habit is more necessary to be attained, in order to facilitate the ready adoption and right understanding of the applicability of this Issue, than the being ready in discovering the nature of the important averments, and whether they are avoidance, and by which side they must be made. The precision of those averments must be carefully enforced, that the pursuer may not be surprised, or be injured in his rights by loose allegations.

That this part of the system is making sure and rapid progress, will be distinctly shown in the course of this statement: but that this progress may be sound, and suited to the ends of justice, the first effort must be to render the averments in condescendences and answers perfect, as on that hinges the safe adoption of the General Issue, and its extension to various actions and large classes of cases. This will not only produce the effect of making it safe to use the General Issue, but it will completely relieve the cases from all unnecessary matter, and will point out with much correctness, what parts of the cause are necessary to be supported by evidence, so as to limit the evidence to what is material, and entirely to exclude preparation of proof for what is immaterial.

In the course of the *second period* of the Jury Court Institution, when the whole work of preparation and adjustment of Issues was within the province of that Court, as to the appropriated causes, and the causes remitted entire to it, the system of obtaining ADMISSIONS to be engrossed with the Issue was introduced. It was the able and useful suggestion of Mr. William Clerk, who is at the head of the Issue department. It has been attended with the most beneficial effects in a variety of ways, and ought not only to be maintained, but every effort should be made to improve it. It secures parties from any injury of being turned round upon proof, which is self evident—it condenses the evidence—it relieves from a search into the

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immense bundles of papers in the process during a trial—it relieves from debates at trials, as to whether admissions contained in condescendences and answers are made under circumstances to permit of their being laid before the Jury.

The admissions (which are engrossed with the Issues), are obtained by discussions with the Issue Clerks, and Counsel and Agents of both parties, calmly and deliberately conducted. This brings the matter in difference so near a point, with the minds of the contending parties in such a fair temper for useful admissions, as not only to give security to fair trials, and to the abridgement of evidence &c. but often leads to just and salutary accommodation.

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GENERAL OBSERVATIONS ON SPECIAL CASES.

It may be considered that Issues of specific fact will be no longer used, but that Issues upon the point or points of the cause will be used, First, In those actions in which the special nature of the case, and the multiplicity of alleged breaches, require them; Second, When the General Issue, proper to try the cause, has not yet been attained.

Attention to the Issues in such special actions is of the utmost importance.

The general rule or principle to govern in the formation of such Issues cannot be stated with more precision than by saying, that they must never put specific facts in issue, but always put a general question upon the points in the cause. If this is attended to, and the verdict on such Issues remains undisturbed, a judgment follows as a matter of course.

From what has been stated, it may be considered, as an axiom, that no practical form of such Issues can be settled to suit all cases; but that the Issues must be drawn from a correct consideration of the averments and denials which the parties continue to maintain. So that, in this class of Issues, the bringing averments and denials to a precise point is, if possible, perhaps more necessary, than in cases where the General Issue is used. If this is done with such perfectness, as it is capable of, the conversion of the averments and denials into the proper questions, to form Issues upon the points in the cause, will become an easy operation, and will be calculated to exhaust the case between the parties.

CONCLUSION OF GENERAL OBSERVATIONS.

In all the large circle of actions and classes of actions to which the General Issue is applicable, when the Issue suited to the nature of the action is settled to satisfaction, it will amount to what may be termed a practical form or style, applicable to every action of the sort.

In proportion as such practical forms or styles are attained, applicable to their respective actions, the state of preparation is advanced, and the union with the Court of Session becomes more safe and advisable.

My object and anxiety in entering with so much minuteness into the analytical view of our system, is founded, *First*, on having had it pressed upon me lately from different quarters, (by persons for whose opinions I entertain the highest respect) that the parties should be required to join Issue on the summons and defences, and to prepare the cause, at their own risk, without the superintendence of the Court, or the assistance of the Clerks of the Issues, and that the form of a question should be dropt, and the Issues be made to rest upon the summons and defences. *Secondly*, Because, owing to our system having had but slight original precedent to support it, being, almost, a new creation, dissimilar both to the mode of special pleading, as it has always prevailed in England, and to any form of process in Scotland, (except in so far as the form of process, by condescendence and answers, is used for the purpose of attaining what constitutes the foundation of our Issues,) it requires minute explanation to render it properly understood. But above all because the rules for framing Issues being capable of distinct explanation and practical execution, form, by being distinctly explained, an important basis on which to decide as to the period of uniting with the Court of Session.

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I now proceed to lay before the Commission the present position of preparation.

PRESENT STATE AND FURTHER PROGRESS OF ISSUES.

To render this very material part of my statement clear and distinct, I have annexed a list of the actions appropriated to the Jury Court by the 6th of Geo. IV.; and another, consisting of those actions which have been invariably remitted entire by the Court of Session to the Jury Court.

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The following observations will show the progress which has been made in the preparation of Issues, in all the actions contained in those lists.

PRESENT STATE AND FURTHER PROGRESS OF ISSUES.

LIST I.

Of appropriated actions, the frame and expression of Issues are settled in

No. 1. *Assault and battery.*

No. 12. *Reductions on the head of facility and lesion, furiosity and idiotcy, force and fear.*

LIST II.

Of actions not appropriated, but invariably remitted entire by the Court of Session to the Jury Court, the frame and expression of Issues are settled in

No. 13. *Reductions of Deeds, as not being executed according to the solemnities of the statutes—Deeds obtained by fraud—Deeds alleged to be forged.*

As soon as a cause is prepared in an action of *common assault*, the Court is enabled at once to apply the General Issue in these words; "Whether on or "about at the defender did assault "the pursuer, to the injury and damage of the said pursuer." Damages laid at £.

The implement or mode of assault may be stated according to the fact, as it is substance, and not *res gestæ*.

If there is a justification to be set up, as that the pursuer first assaulted the defender, the Court is enabled at once to apply the Issue for the defender in these words; "Whether at the time and place aforesaid, the said pursuer first assaulted "the said defender."

2d Murray's Reports, p. 520. July 18, 1821.

This Issue by the defender, in justification, is correct, as by reference to the date of the assault, it makes it, if true, a complete justification, by making the assault complained of self defence against a previous assault.

In the very important head of *assaults in the case of public officers in the discharge of a public duty*, the mode of stating the Issue has not been settled. In the only important case of this sort, there was great anxiety to be right. Perhaps that anxiety, and our not having then attained sufficient skill in resorting to the General Issue, was the cause of those Issues being defective. The error is minuteness, and want of distinctness. It certainly was possible to extricate the question, and get the real point of defence before the Jury, leaving it upon the single question of whether the officer had done more than was necessary, or what was complained of, was a natural result of his justifiable acts. But an Issue should be plain upon the face of it, in order to afford a safe and just trial.

3d Murray's Reports, p. 408. 15 May 1825.

As soon as a cause is prepared in an action of REDUCTION, the Court is enabled, at once to apply the General Issue in these words; "Whether the Deed of "is not the Deed of A. B. the granter."

I may state, confidently, that the Issues cited are become the appropriate General Issues, in the respective actions of *common assault* and *reduction*, and that they will be uniformly acceded to as the proper Issues to try those actions.

With respect to the action of reduction, the General Issue, specified above, will be understood to comprehend all the grounds of reduction included in the Summons, and sustained by averments in the Condescendence—Such as reduction for want of statutory solemnities—for incompetency of subscribing witnesses—for mental incapacity—for fraud—for facility and circumvention, and all other grounds, except *death-bed*.

LIST II.

No. I. *Reductions under the head of Death-bed.*

Cases of Death-bed were remitted both under the first and second periods of the Jury Court Institution. None have been yet prepared under the *third or present period*. The Issues on which these reductions have been tried, have been a mixture of Issues of specific fact, and General Issues, on the points of the cause. Latterly,

See particularly 2d Murray's Reports, p. 551.

PRESENT STATE AND FURTHER PROGRESS OF ISSUES.

Issues of specific fact have been excluded. All the questions that can arise on Death-bed reductions, have occurred in the course of those trials, and have required the Judge to direct the Jury upon the law on all of them. Such as the law of Support—whether the place gone to was, according to law, a market, &c.

This head of reduction cannot be brought under the General Issue, applicable to other reductions, because the deed is good as to all that the heir-at-law cannot challenge, and the action is maintainable only by the heir-at-law, for what he can challenge. But it is advisable to have a General Issue, which would comprehend all the questions that can arise in a deed challenged as defective, *ex capite lecti*, whether questions flow from the averments of the pursuer or defender.

In a case which was under consideration for preparation last summer Session, I felt a great anxiety to have a General Issue appropriate to death-bed deeds settled. I had many consultations with the Clerks of the Issues, and afterwards conferences with all the Judges. The cause has not been proceeded in, but enough of advance was made to satisfy me, that in the first case of death-bed that is brought forward for the final adjustment of an Issue, an appropriate General Issue to suit that head of Reductions will be settled.

LIST I.

No. 13. *Maritime Insurances.*

No. 14. *Insurances against Fire.*

No. 15. *Insurance of Lives.*

It may be stated generally of all these, that though no settled General Issue has yet been concerted, chiefly because there has been no action on policies on ships in this *third period* of the Jury Court Institution—Only one on Insurance against fire, and one which has not been proceeded in, on insurance on lives; yet the approach has been made, so as to secure it in correct form, when such cases next come before the Court.

It is not unfit to observe, that having given the form for a General Issue in these cases very full consideration, I entertain some difficulty as to the manner in which it should be expressed, probably from my having been habituated to the General Issue used in such actions in England. The declaration in actions upon policies in that country, states, that the defender undertook and promised to insure, &c.—the defender denies that he undertook and promised, &c.; and under that General Issue, all the questions which void policies are triable. My doubt is, whether it would be better to adopt this phraseology; putting the question, Whether the defender undertook and promised to insure, &c. and that he has not paid the loss—or, Whether it would not be more suited to our mode of expression, and be more simple to say, Whether, under the policy, &c. the defender had become liable to pay the loss, &c.

Where a case has advanced to such ripeness as to render the wording the sole object of consideration, it may be said the General Issue is attained—and I cannot forbear adding, that when a practical form or style of General Issue for such actions is attained, it will be used in this country, (through the medium of previous averments well settled, and admissions engrossed with the Issue), free from all the objection, which, in the minds of some, and which, in reality too, may attach to the General Issue in this class of actions, in England.

LIST II.

No. 3. *Invasions of Patent Rights.*

3d Murray's Reports, p. 198.

An Issue was settled in an action tried, (respecting the ingenious and useful machine for drawing ships out of water,) sufficient to secure a good General Issue in such actions.

No. 4. *Rights of Public Highway.*

Rogers v. Harvey.

An Issue was well settled in an action lately tried, as to a public foot path near Glasgow, sufficient to secure a good General Issue in such actions.

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No. 6. *Action for diverting a Water Course.*

An Issue was settled in an action tried in the July sittings, sufficient to settle a good General Issue in such actions*.

* Sir James Suttie v. Aitchison.

The preceding enumeration exhausts the actions in which the advancement to settle appropriate General Issues is completely settled, or so nearly completely settled, as to be no longer a subject of difficulty in respect to the Issues; but they must always be a subject of great attention in the preparation of condescendences and answers.

I shall take the remaining actions in the order in which they stand in their respective lists, observing upon each in its turn.

LIST I.

No. 2. *Defamation and Libel.*

On the various points which arise in this class of cases, there has, at different times, been much and very anxious consideration. Actions for *defamation* are, by the Law of Scotland, maintainable for all words spoken, which affect the moral character of the individual of whom they are spoken, or where harassing the mind is the effect of the words spoken.

To secure defenders from vexatious actions, and to enable them to defend themselves in such cases by accurate specification of the circumstances of the defamation, it has been the practice of the Jury Court, in preparation of condescendences, to require minute averments of the time when, the place where, and the person to whom, the words were spoken. The attaining this has created, very recently, some difficulty in preparation of these Issues.

As to actions for words spoken, as well as written libel, there is, in preparing the Issues, much to be done on the right use and proper place of innuendoes.

There is great embarrassment from the doctrine of the *compensatio injuriarum*, not necessary to be entered into here.

The mode of stating the *veritas convicii*, I consider to be settled. When it is pleaded, there must be Issues upon it for the defender, which must state with particularity the *veritas* that is to be set up, with dates, persons, places, &c. &c.

There are many defences which require no Issue on the part of the defender, as the defence falls under the General Issue. Such as giving the character of a servant —the solvency of a person with whom dealing was going on or intended—that the defamation was matter of criticism—that it took place in a cause, and the like. The only correction in order to secure against surprise in such defences, is to pay attention to the averments in the answers.

Actions have been successfully tried on the General Issue appropriate to libel or defamation. If, therefore, the particulars remarked at the commencement of this article were brought to greater perfectness, this head of action might be considered as sufficiently settled, as to the frame of Issues.

No. 3. *Actions on account of Injury to Moveables or to Land, where, in this last case, the title is not in question.*

This general head includes a variety of particular actions, so that it is impossible to give any satisfactory solution of the improvement of the frame of Issues, or their present actual state, unless each particular cause of action was to be selected and enumerated.

No. 4. *Actions of Damages for Breach of Promise of Marriage.*

There has been no case of this sort come to issue since 1816. It was to assess the amount of damages which were found due by the Court of Session. No light, as to the frame of the Issue, is to be derived from it.

1st Murray's Rep. p. 82.

No. 5. *Actions for Seduction.*

No case has come to issue. One is now in progress, and will probably settle a General Issue on this head.

PRESENT STATE AND FURTHER PROGRESS OF ISSUES.

1st Murray's Rep. p. 817.

No. 6. *Actions of Damages for Adultery.*

One case of this kind has come to trial. This Issue is sufficiently accurate to form a good precedent for an appropriate General Issue in all cases of that description.

No. 7. *Actions for Delinquency, or quasi Delinquency of any kind, where the conclusions shall be for Damages and Expenses only.*

This general head, like No. 3, includes a variety of particular actions, so that it is impossible to give any satisfactory solution of the improvement of the frame of Issues, or their present actual state, unless each particular cause of action was to be selected.

No. 8. *Actions on the responsibility of Ship Masters, and Ship Owners.*

No. 9. *Actions on the responsibility of Carriers by Land and Water.*

No. 10. *Actions against Inn-Keepers and Stablers, for the safe custody and care of Goods,* and cases falling under the edict *Nautæ Caupones Stabularii.*

There have not, as yet, been any Issues settled in these actions.

In all the cases where the responsibility is founded upon an implied obligation of the law, there will be no difficulty, but there has been no experience. The responsibility, however, frequently arises out of very special circumstances, to which it may be difficult to apply the General Issue.

Murray's Reports, Vol. 2. p. 158, 194, 201. 261.

There are some instances of Issues which have been tried, in respect to accidents by the overturning of public coaches, in which the Issues are sufficient to show that, in that particular head, an appropriate General Issue will be easily settled. Such actions may class under No. 9, though the grounds of liability vary.

No. 11. *Nuisance.*

Arrot v. *White.* *Hamilton* v. *White.*

The Issue in this action has been greatly improved in point of expression; and instead of being an Issue of specific fact, is now a General Issue on the part of the pursuer. But counter Issues for the defender on allegations in avoidance have been used even until this time, as appears in two actions tried lately. The next time such an action is in Court, the defence of the nuisance being ancient, and the pursuer having come to the nuisance, may be tried on the General Issue.

But if the defender sets up *special* acquiescence, this is a plea not in avoidance, and there should, I think, be an Issue for the defender.

No. 16. *All Actions on Charter Parties.*

No. 17. *All Actions on Bills of Lading or Freight.*

No. 18. *Contract for Carriage of Goods by Land or Water.*

No. 19. *Actions for the Wages of Masters and Mariners of Ships.*

Upon these there has been no experience whatever, as no action under any of the heads has ever reached the Jury Court. They suggest, however, for observation, matter of great importance, in relation to the period of Union, by affording a very intelligible illustration of the measures which may be taken to accomplish uniform and perfect preparation, and for settling the frame of Issues.

It appears to me to be advisable to allow the system of Issues to make a further progress for a time in practice, and thereby adding to the number of General Issues, because practice best secures against error or mistake. But as the principles become more fixed, and the facility of the mind in applying them becomes greater, and the machine of Jury Court preparation is made more powerful, by the constant attendance of other Judges, it will become desirable to add to the number of instances of General Issues, appropriated to particular actions, by the abstract consideration of the nature of actions, and the hypothetical frame of General Issues that would suit them.

By a judicious and cautious mode of proceeding in this way, the practical forms of appropriate General Issues could be increased; and any error in attaching General Issues to actions which do not admit of them, could be secured against by attention.

I will

PRESENT STATE AND FUTURE PROGRESS OF ISSUES

I will endeavour to illustrate what I mean by actions of *Charter Party*, and for *Seamen's Wages*.

In *Charter Party*, the action must be founded on the written contract, which is more or less complex, and contains more or fewer covenants, according to the nature of the service in which the ship is to be employed. But in the simplest case of Charter Party, the breach of the covenants must be the ground of the action; and consequently, the Issues must be specially applied to the breach in each case, and therefore a practical form of General Issue is not applicable to it.

Seamen's Wages is not like a common contract of service; for though the contract of service may be clear, yet there may be peculiarities to show that the wages are not due. Here then is a case where the averments of avoidance are to come from the defender; such as, that the freight was not earned, and the wages not due; freight being the mother of wages. Besides common law avoidances, there are statutory avoidances. All these must be averred; but they are all avoidances, and these may be tried under a General Issue.

I think, after some farther time of probation in practical Issues, it might be most advisable, in this way, to separate the large combination of cases contained in Numbers 3 and 7, and likewise those of 8, 9, and 10, and try to set apart those in which a General Issue is not applicable, and to fix an appropriate form of General Issue to those to which it is applicable.

This would greatly accelerate preparation; and if such should become an object, it is well known that there are, in the department of the Issues, gentlemen who are perfectly capable of discharging such a duty.

LIST II.

No. 7. *Servitudes.*

Appropriate General Issues, as will appear in the sequel, have been attained in some servitudes. The generic term contains so many different species, that this head may fall properly under the observation made upon head N° 3 of the appropriated actions.

No. 8. *Appointments to Magisterial and other Public Offices.*

The warrants by which they are assumed, and the grounds for setting aside the right to the office assumed, are so various, that it would require some practical experience to settle the frame of Issue. Those which hitherto have come before the Court have gone into very minute Issues of specific fact.

No. 9. *Contracts of Service.*

This is a simple contract, which will admit of a General Issue. A practical form has not yet been established in this Issue.

No. 10. *Contracts of Apprenticeship.*

The indentures and the circumstances peculiar to this contract, make it desirable that there should be more cases brought under it, before a correct judgment can be formed as to the frame of the Issue. As this is one of the most important civil relations that exists in society, it should be cautiously dealt with.

No. 11. *Wrongous Imprisonment.*

In this head of action, the General Issue has not been settled. There are two recent cases in which the Issues are dated the *11th March* 1826, the day the last Winter Session closed. I tried them at Glasgow in September. They are Issues upon the point of cause, viz. on the legal tender of the debt, and not a General Issue upon the wrongful detention in prison. On this occasion I missed the settling a practical form of a General Issue in this class of actions. But my error is seen, and will be corrected.

PRESENT STATE AND FUTURE PROGRESS OF ISSUES.

No. 12. *Bills of Exchange and Promissory Notes.*

On this head of action, the questions that have hitherto arisen in the Jury Court have turned upon, whether the name put to a bill was forged—on which the Issue has always been, "whether the writing was the true and genuine hand writing of the "party."* Nothing has yet occurred on the infinite variety of questions for settling Issues which belong to this species of obligation. But they should be considered as cases for the General Issue of liability, the particular grounds of defence being properly averred.†

* See a very important case—3d. Murray's Reports, 97.

† The Issues, when there were special grounds, have hitherto been very defective. 2d Murray's Reports, 479.

14. *Contract of Sale.*

The ordinary simple contract, which is the ground of demand, with the avoidances which may be set up by the defender, may, upon the principles which have been so frequently stated, admit of a settled practical form for the General Issue. But not if it rests on a special written contract.

15. *Actions for Furnishings.*

Murray's Reports, vol. 1, p. 256. Morgan *v.* Hunter, Tried June 27, 1817.

In the *first period* of the Institution, one of the most extraordinary instances of Issues of specific fact is to be found, arising out of an action respecting a library table. Such a case now, would be tried upon a short General Issue.

No. 16. *Damages for Abstraction of Multures.*

This is a *species* falling under the *genus* of servitude; and a recent case affords an apt illustration of the improvement of the disposition to entertain, and the capacity to frame the General Issue.

The *defences* were several to avoid the liability;—viz. that the mill was not in a condition to grind good marketable flour, was not adequate to grinding the corn produced within the thirl, or to answer the demands of the thirl. The quantity of corn not brought to the mill could not be agreed upon. The Issues prepared, therefore, were several Issues on the part of the pursuer, and special Issues on the points above mentioned on the part of the defender.

The knowledge of the special Issues on the points of defence in this case, reached me when I was confined by indisposition. I felt extremely anxious (at this particular crisis *especially*,) that nothing should happen to retard our progress in the system of Issues; and Lord Mackenzie, to whom, (in consequence of my illness,) the adjustment of this Issue belonged, was so good as to let me have an opportunity of talking with him upon it. The result was, that he settled a General Issue, which will be a practical form in future in all such cases, viz. "Whether the defender did wrongfully abstract, &c. from the mill of the pursuer, to the injury and damage of the pursuer?"

* * * * * *

The view of Issues just given has been confined to the obtaining the use of well concerted General Issues, so as to serve as a practical form or style, and to the rules for framing Issues on the points of the cause. But there are other considerations of great importance in the preparation of Issues, to which wholesome rules must be applied, as cases may arise. A facility in this is essential; and to explain the import of this observation, I have adduced the two following specimens of what may be termed Issues adapted to the nature of the case. When the principle or rule is once pointed out, there is no great difficulty in using it in cases within its scope, as they may occur.

No. 17. *Actions on Contracts for the performance of Works.*

The Issue in this case will so frequently depend upon a written contract, that it cannot be stated as a head of action that can have a General Issue appropriated to it. It will happen, too, that there may be in this, as in many cases of written contracts, well known established usage which, though not expressed in the contract, must, as being well known, be held to have been in contemplation when it was entered into, and binding, though not expressed in the instrument. In adjusting an Issue, in such a case, any expression in the Issue, implying that a written contract is to be controlled by evidence of extrinsic matter must be avoided. A case of this kind has recently occurred, in respect to the contract for paving the Calton Hill. The question was, whether, in conformity to an alleged usage, the contractor was entitled to the

the chips of the causeway stones. The Issue which was finally considered as adapted to try this question, and as having no implication on the face of the Issue, that evidence could be given to explain the written contract was, "Whether the defender was bound and obliged to secure the said refuse or chips to the pursuer as his property, and whether he had failed," &c.? This was thought preferable, by all the Judges, to an Issue in this form—"Whether, at the time of entering into the said contract, it was understood and agreed that the pursuer was to have the disposal of the chips," &c.?

PRESENT STATE AND FUTURE PROGRESS OF ISSUES.

Inglis v. Cunninghame.

No. 18. *Actions for Injuries to Houses or Structures of any Description.*

There have been several actions on this subject tried, both in the early period of the Institution, and recently, but the Issues have never been settled in a satisfactory manner. As they are matters of frequent occurrence, care must be taken to frame the Issues in clear technical language, in words which have an appropriate meaning, avoiding those vernacular words, which are vague in their meaning.—A rule of infinite consequence, as it secures precision in trial, prevents vagueness in preparing evidence, and in offering it. The correct use of legal and technical language is the great security of rights. The Issue referred to I tried on the last Circuit at Glasgow, "Whether the operations carried on by the defender were illegal and *improper*," &c.

As I introduce these details here, for the purpose of presenting facts as to the state of our preparation, to enable a judgment to be formed of the period of uniting with the Court of Session, it would be entirely out of place to enter into suggestions of emendation. Such mistakes as these are now well understood, and will not be repeated.

* * *

OBSERVATIONS.

There has always been a strong prepossession in my mind, and an ardent desire (as may appear from all I have written and said formerly on the subject) to unite Trial by Jury in civil causes with the judicature of the Court of Session; and to have it in my power (during my life) to deliver the Institution safely over to the ancient judicature of the country. But at the same time, I have expressed a great repugnance to part with it, until I should see the preparation of causes, and the system of Issues sufficiently advanced, to make incorporation safe and advisable. The other branches of the institution are so well advanced, and have answered so completely, that these only retard incorporation with the Court of Session.

The great and marked distinction between the *third period* of Jury Court existence, and the two which preceded, is, that the professional mind of the country is informed and convinced upon the true system of Issues, *namely*, that they shall be general in all cases, except those, where, from the nature of the action, they must be Issues upon the points of the cause; and there is a general conviction that this system is safe under the protection of accurate averments and sound preparation, superintended by able and conscientious Judges.

By this revolution and happy conviction, Trial by Jury, rightly understood, is now completely introduced into our system. The right understanding of Trial by Jury being—that the Jury, judging of the facts, takes the direction upon the law from the Judge; that the Judge is bound to give his directions to the Jury, according to his view of the law; the errors of which direction may be afterwards questioned, and carried to higher tribunals, to be corrected by more mature thought, more inquiry, and more deliberate reflection. But if the verdict is sound and unquestioned, that verdict is the foundation of a judgment, without farther application or resort.

There have been several tests of this disposition to the correct system. But the striking proof to my mind, was what happened at the æra of trying the case of the Earl of Fife, under a General Issue prepared by the highest authority.

On the 16*th June* 1824, the Counsel in the case of *Clerk* v. *Spence*, an action of reduction of a deed on several grounds, were not satisfied without Issues applicable to each of these grounds; and at the trial, on the 16*th July* 1824, these learned persons required a verdict on each of the Issues. I acknowledge, that strong as my conviction was of the advantage of the General Issue, I was not bold enough to enforce a verdict (where such interests were concerned) upon one Issue, which I considered to cover all the questions.

PRESENT STATE AND FUTURE PROGRESS OF ISSUES.

On the *9th of March* 1825, the case of the Earl of Fife was successfully tried on the General Issue sent by the House of Lords; "Whether the deeds were not the "deeds of James Earl of Fife?"

A new trial had been granted in the case of *Clerk* v. *Spence*. The second trial of that case took place on the *14th of March* 1825, five days after the trial of Lord Fife's case, when the same Counsel, who thought at the first trial, they were not safe without verdicts on each of the Issues, convinced by the efficacy of a General Issue in Lord Fife's case, consented, by a written minute, to confine the verdict to a General Issue, of whether the deed was not the deed of Mrs. Clerk.

3d Murray's Reports, p. 481.

This was followed by a trial in another reduction *on the* 16*th March* 1825, on the General Issue, of "Whether the deed was not the deed of the granter."

Cunninghame v. Spence.

It is equally fortunate and satisfactory to be able to state such a proof of the establishment of the conviction in the wisdom of a system, so essential to the perfection of the Institution; and to be able to submit to the consideration of the Commission that, what may appear in evidence before them as matter of opinion, is confirmed by most distinct, unerring, and well vouched practical instances.

* * * *

To complete this part of the statement, it is proper to mark with particularity the distinction which must guide, when the defender's case may be brought under a General Issue; and when an Issue is required upon the part of the defender.

The principles which govern it can be stated with perfect clearness. But it may sometimes require nice discrimination to discover, in certain cases, whether the principle applies.

It may be laid down as an axiom, that, in all actions admitting of the General Issue, where the defence rests on the defender's avoidance, that is the proper Issue for trying the cause; and no Issue should be given in by the defender. But where the defender states a defence which is not an avoidance, but raises a question against the right of the pursuer to succeed in his action, on account of some act, or some peculiarity of situation, which takes away the right of action, or the right to recover under it, the defender must set out his averments, with as much particularity as he would in an original action; and the averments must (as in an original action) be brought into shape and precision for forming an Issue. This will be best understood by contemplating justifications in assault or defamation; but the doctrine is not be confined to those instances only.

I consider this to be one of the most important distinctions in the system of Issues, and that it has not yet taken sufficient root in the Jury Court, or in the profession.

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As to the Proceedings which take place after Verdict.

PROCEEDINGS AFTER VERDICT.

Motions for new trials having been already discussed, there remains for consideration:

First, Special Verdicts.

Second, Special Cases.

Third, Bills of Exception.

SPECIAL VERDICTS AND SPECIAL CASES.

Special verdicts and special cases differ in this. A *Special Verdict* is found by the Jury. A *Special Case* is drawn up by the agreement of parties. Each contains the facts necessary to raise the question of law for the Court to decide.

The Court being to pronounce the law upon the facts found by the special verdict, or stated in the special case, those judicial instruments stand precisely in the same situation, as to the effect they are intended to produce, viz. a judgment of law, upon ascertained facts.

In England, there is a benefit attending special verdict, which does not belong to special case. A special verdict puts the facts upon record, and therefore can be carried by writ of error to the last resort. A special case does not put the facts upon record, but receives its final decision in the Court out of which the record comes. But, on the other hand, there is great facility in settling the facts by a special

SPECIAL VERDICTS AND SPECIAL CASES.

special case, as it can be done deliberately, after trial, from the Judge's notes, without waiting for the finding of the Jury. To unite the two advantages, the practice in England of late years has been, to agree at the trial to have a special case drawn up with leave, at the instance of either party, to have it converted into a special verdict, and so put upon the record. If it should be considered, that any form of the law of Scotland requires such a precaution, it may be advisable so to arrange it—but it appears to me, that the House of Lords could as readily entertain an appeal from the Court of Session upon a special case, as upon a special verdict.

I have now to state, as applicable to both these judicial instruments, (most useful parts of the machinery of trial by Jury) that the greatest care should be taken in their preparation, and the utmost attention should be paid in pronouncing judgment upon them, both in what regards the form of the instrument, and on the substantial merits of the cause. Because, if the form of the instrument is not perfect, the merits of the cause are not placed correctly, before the proper tribunal, for a sound judgment.

There has yet been only one special verdict, and one special case settled in the Jury Court, and adjudged upon in the Court of Session.

Cunninghame v. Spence. 3d Murray, 402.

The cause in which the *Special Verdict* was settled, has already been referred to under another head. It was a trial upon a General Issue for the reduction of a deed, as having been attested by a witness who was incompetent, in law, to attest a deed, as being blind.

The cause was tried before Lord Pitmilly, Lord Gillies, and myself. After the evidence and the hearing of Counsel had been entirely gone through, we agreed that it was better to have it settled by a special verdict. We drew up and submitted to the leading Counsel, on both sides, the facts which we thought should constitute the special verdict. They were satisfied of their correctness; I then submitted them to the Jury, who found them to be true. The verdict was returned to the Lord Ordinary, who pronounced a judgment upon it, reducing the deed. This judgment is become final.

Murray's Reports, vol. 3. p. 294. Tried 24th Feb. 1823. Thompson v. Bisset.

The cause in which the *Special Case* was settled, was one upon a policy of insurance, in which there were questions of great importance. The Issues were Issues of specific fact. The specific findings by the Jury were correct as to their truth, but the verdict was not calculated to settle the question. I was anxious to have it converted into a special case, and after some, rather procrastinated litigation, it was so arranged. The case was drawn up from my notes, and I had frequent intercourse on it with the Counsel and Agents; a judgment has been pronounced upon it by the Second Division.

I have mentioned the progress of those cases, for the purpose of shewing the sort of attention that is necessary in preparing them, and the small experience that has been had in such preparation. I shall only state further, that the principle which must direct in the preparation of such judicial instrument is, that they must be rigidly confined to facts which raise a proposition of pure law, to be decided by the Court, and that they must not contain any facts from which inferences or conclusions of fact, or opinions upon fact, remain to be drawn, as such facts do not leave a pure question of law, but are exclusively for the consideration of the Jury under the direction of the Judge upon the law.

If a special verdict or special case were to be presented to a court of law in England, with facts in it of the nature last mentioned, it would be sent back for trial under what is called a *venire facias de novo*. So if for want of skill these legal instruments were to go under such circumstances to the House of Lords, it must be supposed that they would meet with the same fate. The same would be the result, if the special verdict or special case, had omitted any material fact for the decision of the law. The greatest care and skill will not always secure against such mistakes, which are frequently discovered by the Judge after argument, in Court, and though manifest when pointed out, were not apparent before.

If they happen where the special verdict is the judicial instrument, they can only be corrected by another trial; because the verdict of the Jury cannot be touched, and months or years of litigation may thus go for nothing. Whereas, if they happen in a special case, the agreement of parties can set the error right.

It is to be observed, farther, that using a special case is preferable to using

SPECIAL VERDICTS AND SPECIAL CASES.

a special verdict, as far as the matter bears on the subject of present consideration; for the power of amendment diminishes the objection to union with the Court of Session, for the want of perfectness, in what relates to this description of proceeding after verdict.

BILLS OF EXCEPTION.

BILLS OF EXCEPTION.

According to the course which has prevailed in the Jury Court, bills of exception are of great importance. They were pointed out at the time the first Act of Parliament was under the consideration of the Legislature, as the remedy which ought to be resorted to, as best calculated to answer the purpose of redress as to the errors, in matter of law, which might be committed by the Court at the trial. It is a remedy that has been rarely resorted to in England, although it has been there regulated by statute for centuries. The deficiency of instances of bills of exception in England, in point of number, rendered it extremely difficult to derive any satisfactory light to guide us, either as to the form or the manner of acting, in respect to that judicial instrument. When the bill of exceptions relates to the admission or rejection of evidence, I expect soon to fix a correct form of judicial instrument, on which the Court above will be able to give judgment. If the Judge refuses to receive the evidence, the bill of exceptions must state the object for which the evidence is offered, and the description of the evidence which is proposed to be given. This the Judge must take from the statement of Counsel, and it must be so set out in the bill. But if the evidence is received, the bill of exceptions must state the evidence as it is given. Justice to the proposer requires this, because it must be taken to render what is proposed correct. Justice to the exceptor requires it, because the evidence given may afford objections to admissibility, which the statement of Counsel did not present to the Court. In either case, the evidence proposed to be given and rejected, or admitted and given, must appear upon the face of the bill of exceptions, in order that the Court above may judge of the correctness of what the Judge ruled at the trial.

Clark *v.* Callender 2d Murray's Reports, 87.

In a bill of exceptions which was carried by appeal to the House of Lords, it was observed, from the Woolsack, that the evidence which was proposed to be given, and was refused by the Court, was not sufficiently stated upon the face of the bill. But as the Lords were enabled to make out with sufficient certainty the principle on which the objection of the evidence was ruled at the trial, judgment was pronounced by the House of Lords upon the bill of exceptions, rather than turn the parties round on form. In consequence of what passed, and was communicated to me at that time, I think it may be said with certainty, that bills of exception upon the admission or rejection of evidence, will not be long of being accomplished, so as to have a practical form of this judicial instrument. The terms of the Issue or Issues out of which it arises must be attended to, and care taken to state with correctness the object of the evidence, and substance of it, if it is a case of refusing evidence, or the evidence which has been given, if it is a case where evidence has been admitted.

But bills of exception to directions on matter of law given by the Judge to the Jury, are not yet in a state of preparation to admit of similar observation.

Before I enter into this, it is material to observe, that the office or purpose of a special verdict, and special case, is to place facts upon the judicial instrument on which a judgment is to be formed, as to the law of the case; and that the facts must therefore not be inferential. But the office of a bill of exceptions, applied to the direction of the Judge to the Jury, on the law, to which the Jury are to apply the fact, to form their verdict, is to correct mistake of law, applicable to facts which are inferential. The first is, to settle law on facts, over which the Jury have no jurisdiction, excepting finding their truth. The second is, to settle law applied to facts, over which the Jury has jurisdiction, as to their bearing, or what they infer.

It has always appeared to me, that *bills of exception* to directions in law are in England correct in form, and vague in substance. It has been my anxious desire, (hitherto not accomplished,) to make them correct in form, and not vague in substance. I thought it would leave the matter in much too loose a state if they had been left upon the vague generality, that the Judge had directed the Jury to find a verdict for the pursuer; but that he ought to have directed them to find a verdict for the defender, and *vice versâ*. I have therefore always taken pains, where an exception

exception has been taken to my direction, to have the direction put down in the bill as nearly, according to the words in which I stated the law as possible; and to have the exception taken to the very words of the direction. I think this essential to justice, especially in the infant state of our Institution. My course of proceeding has been, in communication with the Counsel who excepted to the direction, as to the terms and facts, to set those facts out in the bill which were given in evidence, and are necessary to understand the direction on the law. When this is done, I communicate with the other party, in case they have anything to suggest, as to what may have been omitted or mis-stated. But there are other considerations in this act of preparation which require attention. They arise partly out of observations which took place in the last Appeal in the cause of the Earl of Fife. It was then laid down, 1*st*, That the excepting party must state the direction, which, he says, ought to have been given. It must be stated in propositions, and not argumentatively; 2*d*, if there are two exceptions by the same party, they should be contained in one bill; 3*d*, that the facts must not be taken as admitted, but must be stated specifically, even when the question is one of pure law. Other considerations have occurred to my own mind in reviewing the whole subject with great care. I have considered all the bills of exceptions which have been prepared here (amounting to 14 or 15); I have looked through the law and cases in the English reports. I am in correspondence with eminent English pleaders on the subject. It will require some time, and more mature consideration, to put them in correct form; but I have no doubt of accomplishing it at no very distant period. BILLS OF EXCEPTION.

When the bill of exceptions is taken at the trial, and meant to be carried at once to the Court of Session, there should be a rigid observance of stating and noting the direction and exception at the time. I am sensible that this has not been so strictly observed, in long fatiguing trials, from tenderness to the Bench. But it is a duty which must be performed, and, therefore, the observance should be enforced without such considerations.

By the Statute 1819, it is competent to tender a bill of exceptions on a motion for a new trial, in respect to the law which was the subject of direction at the trial. When this course is followed, there is a better opportunity of deliberating upon the bill of exceptions both as to form and substance, and there may be some benefit derived from the Court in which the question is agitated, being in the train of considering such subjects. If, however, there is in the case nothing on which to move for a new trial, (otherwise) it is an additional step attended with some delay and expense.

On the whole, there is nothing in this judicial instrument, that, in point of preparation, may not be soon accomplished to satisfaction.

But what I would take leave to suggest, as a very important consideration in this branch of the Institution, is, that some measure should be adopted which will, as far as possible, give security to the consideration of proceedings after verdict being correctly considered, in adjudging upon them. They are, both in form and substance, purely of English origin. They are of such nicety, that they are often, in that country, found to be erroneous even in the very last stage of the proceeding. It is not to be wondered at, then, if mistakes should be committed here. It is most desirable that every practicable measure should be taken, especially, now, that the period of uniting is in view, to put this part of the system (remedies after verdict) in a condition that will, in due time, establish the principles on which they should be judged.

Before I conclude this branch, I may be permitted to remark, that these acts of preparation are not directed by any of the Statutes to be superintended by the Court; and that in England the Judge takes no share in their formation, farther than ascertaining that the law he directed is correctly stated, and that the exception applies to matter of law. But I have thought it incumbent upon me to consider it as a duty imposed upon me officially, to assist in the preparation of bills of exception.

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The subject of costs or expenses does not fall within the instructions to the Commission, nor the reference to me on this occasion. But I think it incumbent upon me to observe, that I have had repeated intercourse with the auditor upon this subject. In the course of the last summer session, after various conferences with the auditor, I had conferences with my colleagues. The result was a determination EXPENSES.

EXPENSES.

that the auditor should visit London, with written instructions to direct his inquiries, and with introductions to persons in the offices of the King's Bench and Common Pleas, where costs are taxed, and to professional men, who could satisfy his inquiries. This mission he has executed, and has obtained a large body of very useful information, which he has very recently digested into the form of a report to the Jury Court. I yet only know the substance of that report, by conversing with the auditor, but I feel satisfied that it will be the means of promoting the great and important object of regulating the expense of the Jury Court. I am not, however, yet sufficiently informed of the details, to enable me to state them in a satisfactory manner. Measures shall be taken upon them in due time, and when the press of the business of the Session and Sittings is over, this object shall not be neglected.

I shall be cautious, however, not to adopt any regulation which would defeat the present system of preparation of causes or of Issues. Every means must be taken to check abusive expense in that branch; but those means must be directed to the course of preparation now practised, and about to be improved, and not to any change of a system, which, I trust, is likely to become so truly valuable.

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Changes required to remove the present Defects as to the manner of Proceeding in the Jury Court, as now constituted.

CHANGES REQUIRED IN THE PRESENT JURY COURT.

The communications and suggestions which took place soon after the appointment of the Commission, and the progress that has been made in some of the matters thought of and recommended, enables me to shorten this part of the statement.

1st, The Jury Court has obtained the apartments of the Commissary Court for the business done by the Clerks of the Issues, and for the Chambers of the Judges; so that instead of being placed at a great distance, with the streets to traverse, in passing from the business of the Court of Session to that of the Jury Court, this Court is now under the same roof with the Court of Session, for preparation; and equally so for every thing done in Court, one of the Court rooms of the Outer House of the Court of Session being appropriated to the Jury Court on certain fixed days. Thus the hindrances from inconvenient distance are removed. In consequence of the recent changes on the Bench of the Court of Session, the number of Lords Ordinary now is seven, so that regular attendance by the two junior Judges, along with me, takes place. They have likewise, by the facility of communication with Chambers, the easy means of carrying on preparation of causes and adjustment of Issues, by the mode of conference so frequently alluded to.

This will enable us immediately to unite the hand and the preparation rolls, and to carry on business together; each knowing the acts of the others, improving our views reciprocally, and putting the other Judges in complete possession of the system, not by detached efforts, but by acting on it, in its whole extent.

There are many subordinate regulations which have occurred, and more will occur in practice, as to carrying on preparation and adjustment in all their branches. Of those I may particularise, an alteration which I contemplate for the purpose of extending a knowledge of the system of Issues to the profession. I do not mean at present to drop the conferences with the Judges at Chambers for the final settlement of Issues. To carry that act to the Bench now, would be exposing it to the eagerness of debate at the Bar. But I intend, when the nature of the Issues require it, that the Judge should state from the Bench to an attending Bar, the principles which have governed the adjustment.

It is of the greatest importance to digest thoroughly, and when digested, to enforce a plan for the preparation of causes, adopting what may be called the Jury Court system of adjusting Issues in Chambers. In the present state of the business in the Court, I think it may be practically executed; and it may be safely conjectured, that before the increase of causes renders this course of proceeding no longer practicable, the art and the habit of correct condescendences and answers may be accomplished.

See nature of causes sent to the preparation-roll.

According to the number of cases which have averagely passed from the hand roll to the preparation roll *per diem* in the Court of Session, in the last year, it will be easy to make an arrangement which will secure those cases being taken up by the Issue Clerks in the first instance, and afterwards by the Judges, so as to have the means

means of deliberately considering the amendments to each article of the condescendence and answers.

CHANGES REQUIRED IN THE PRESENT JURY COURT.

While the Jury Court was proceeding under the arrangement of its *second period* this was executed in substance, but there was a want of power, and frequently a want of time so to execute it, as to make the amendments distinct, and readily to be referred to. There was no authority to compel parties so to place the articles of the condscendences on the paper, to enable comparison to be made of the amendment with the original article. Consequently, there was no means of observing with readiness, what further amendment might be necessary upon the amendment. All this was to be sought in separate papers bundled up with the process, or written on the margin indistinctly, so as not only to discourage, but to defeat, necessary accuracy. Arrangements of the manner of making up the paper, printing the condescendences and answers, placing the articles upon the paper, in a form to admit of ready comparison, and secure accuracy, will be attended with the greatest benefit to all the objects of improvement, and thus afford great facility of adjusting Issues. It will accelerate correct preparation of averments according to their proper frame.

With respect to motions and debates, the having a constant Court of three Judges, on certain fixed days, within the hours of attendance in the Court of Session, when Counsel are at hand, will secure against adjournments, and all their evil effects, will enable the Court to enforce a regular attendance at the Bar, and to correct all defects in the conduct of business.

The regular attendance of other Judges, and all acts being united, and no business transacted separately, uniformity of thought will prevail on the Bench in all subjects of debate, of motion and interlocutor, and the administration, of what may be termed, Jury Court Law, will be readily and completely imbibed by the assistant Judges, while my capacity to perform that duty will be improved; and in Court of Session law, I shall be instructed and kept correct.

All this cannot fail to press on the improvement with a certainty, celerity, and an extension of the knowledge of it, calculated to advance the period of uniting with the Court of Session.

Enforcing the delivery of Issues by the parties is an important consideration, as the means of teaching the art to the Bar, with whom it should, in the end, be ultimately placed; and the intervention of the Judge, or the Court, come to partake more of revising than preparing Issues.

But according to the 34th section of the 6 Geo. IV. I feel it at present to be difficult to deal with the subject. The Act calls upon the pursuer to give in an Issue, by saying, he *shall* deliver an Issue; it enables the defender to put in one; and if the pursuer does not obey the call, or if the defender does not avail himself of the provision in his favour, the Court shall direct a proper Issue to be formed—so that upon failure of parties, the duty is imposed upon the Court.

Being unable to devise under such a provision, how a pursuer could be compelled under a penalty, to deliver an Issue, was my difficulty; and, therefore, I framed the notice as it stands in the Jury Court regulations *of December* 1825. There is another observation upon the 34th clause of the statute, which appears to me as very material, viz. that when there is an Issue upon the part of the defender, there is no provision other than the permissive provision, for his delivering in an Issue, yet the defender's Issue, when it lies upon him to have an Issue, is as necessary as the pursuer's. Under these circumstances, I fear there can be no very adequate regulation except through the medium of the Legislature. Still I think it might be attended with a good effect, if there were a regulation, in imperative terms, ordering the pursuer always to lodge an Issue with his revised condescendence, and a similar order upon the defender when an Issue lies with him, to lodge it, when he lodges his revised answer; to be regularly signed by Counsel, as a security for the sufficiency of the Issues delivered.

In this, and in all other parts of preparation, there should be every effort made to get the acts performed by the Bar, in order that they may get into the knowledge, and consequently into the facilities of preparation from the first to the last proceeding in a cause. It may be added, that nothing will tend more to improve the averments, than the Bar being compelled to draw Issues, as they will soon discover that

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the best test of the correctness of averments, is the using them as the foundation of the Issue in the cause.

To all this, the whole mind and effort of the Jury Court establishment, in all its parts, should be strenuously bent, because by this attainment on the part of the Bar, fixing trial by Jury in the ancient judicature of the country, becomes unquestionably safe and advisable.

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The Period of uniting Trial by Jury with the Court of Session.

THE PERIOD OF UNITING TRIAL BY JURY WITH THE COURT OF SESSION.

The period of uniting Trial by Jury with the Court of Session, cannot be fixed down to a precise date, as it depends on efforts yet to be made. Subject to this observation, I am of opinion, that it may be safely reported, in answer to this head of our instructions, that it will be found to be safe and advisable to unite the benefits of trial by Jury in civil causes, with the jurisdiction of the Court of Session, within the period provided by the 55th Section of Geo. IV. c. 120, for the continuance of the Jury Court, under its present constitution.

My objects in this paper, and the cause of its length, are, that a judgment may be formed, *First*, as to the period of uniting, (not upon the authority of my opinion) but upon the matter which I have stated. *Secondly*, That there may be a disclosure of principles, and specimens of Issues, which may, at some future period, be laid open to the consideration of the profession, so as to accelerate their acquaintance with what they must ultimately perform as a duty. *Lastly*, Because at this critical and important period, the whole system should be disclosed to observation, that His Majesty's Government may be enabled to judge, from the actual state of things, when union is safe and advisable, and, at the same time, that those of high legal attainments may have an opportunity to confirm our plan, or correct our errors.

Besides the *data* which are set forth in this statement, there is a remark of considerable importance, with respect to time. From the first movement of the statute of 1815, until the statute of 1819 was in full operation, the progress of preparation and Issues cannot be reckoned upon as connected with the Jury Court establishment, as the preparation was at that time in the Court of Session, with the assistance of the Jury Court Clerks, as already stated. The statute of 1819 was not in operation until the beginning of the year 1820, and, as has already been remarked, habits contracted, opinions not changed, the fear of compelling what might not have been successful, the interest of suitors, increase of objections to the Institution, besides other obvious causes, retarded the progress of preparation, and did not give fair play to the inclination to the correct system. So that the real disposition of the judicial and the professional mind to receive and act upon the system now in progress, cannot be dated to have taken place at a period previous to 1825. In 1826, with all the disadvantages of an ill arranged plan of acting in the Courts, more has been done than meets observation; because, besides the Issues that have been well settled, the principles have been thoroughly imbibed. The progress, therefore, from the present period, (to the date when the continuance of the constitution of the present Jury Court ceases), must, in the natural course of things, be much more rapid than the two years which have preceded; and when the spur which is given to all minds by the present inquiry is taken into account, the certainty of fitting things for union becomes more convincing.

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It remains for me to deliver my opinion as to the best mode of connecting Trial by Jury in Civil Causes with the Jurisdiction of the Court of Session.

This question I consider to embrace, not merely the trial of causes, but all that relates to what may be called Jury Court jurisdiction, both as to preparation, adjudication, and trials. 1st. There must therefore be provision for the preparation of causes, and the adjustment of Issues. 2d. For motions and debates. 3d. For a judicature to redress the errors committed at trials, and to pronounce judgment on questions arising after verdict.*

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* Before going into the subject of another Judicature for Trial by Jury, I think it right to observe, that in case of any difficulty arising out of the incorporation, in respect to the cases to be considered as

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It appears to me, that if the regulations which are now proposed for acting regularly and unitedly in Court and in Chambers, shall be carried on for a reasonable period, that the scheme of future arrangement will arise out of it.

I need not advert to the benefit that will continue to be derived from the valuable and intelligent assistance of the establishment of the Issue Clerks, and from the intelligent and well regulated conduct of the other Clerks in their department.

With regard to judicial superintendence, from henceforward, the Judges who are to act with me, will become rapidly acquainted with the system of Issues; and may be so placed in the Court of Session, after the union, as to enable them to apply these acquirements to the tribunals to which they may be respectively attached. To secure the continuance of such preparing Ordinaries for Jury Trial, a simple regulation, extending the duty to other Lords Ordinary of the Court of Session, (at a period to be judged of,) will secure the succession of judicial superintendance. When occasion requires it, recourse should be had to the presiding Judge of the department finally to settle Issues; but in general the Lords Ordinary, in their respective situations, will close the record and certify the Issue, and sign it when engrossed. With respect to motions and debates, they should in general be final before the Ordinary. There is hardly any case that I can contemplate, as a case in the course of antecedent preparation, which ought to be made the subject of review, except that of deciding whether decisions on law or relevancy should precede the trial. But instead of making this proceeding the subject of review, from the decision of the Lord Ordinary of the Jury Court, it would be better to let it proceed, at once, to the Inner House, the Lord Ordinary of the Jury Court preparing the cause for that purpose.

JUDICATURE ON MOTIONS.

JUDICATURE IN CASES AFTER VERDICT.

With regard to a judicature to redress the errors of trials, by motion for new trials, by judging on bills of exception, and upon special verdicts and special cases, it can no where be so naturally and soundly placed as in the Divisions, as by doing so, all the difficulties of a new system of regulation, for the purpose of directing and limiting the legal powers of a new Institution, are avoided, things are kept in their known and established course, and the sound administration of the law of Scotland is secured.

JUDICATURE FOR THE TRIAL OF CAUSES.

From what I have said upon the points of jurisdiction which I have just discussed, it is apparent that I am of opinion, that the trial of causes should be presided over by the Presidents of the Divisions of the Court of Session, each presiding over the causes originating in his Division. This was my impression from the time I contemplated and entered upon the functions of the station which I have now discharged for eleven years. It is a topic which I approach with more than ordinary anxiety. I am fearful, among other impressions, that what I state may assume an overweening appearance of self-sufficiency, notwithstanding abundant cause of diffidence which I feel, when I recall the many uneasy and anxious hours I have passed, and express an unaffected apprehension, that I may not have brought to the discharge of my duty that perfectness, which the varied and solemn nature of that duty required.

The papers printed and circulated in 1819, and delivered to the Commissioners in October 1823.

At the commencement of the *second period* of the Jury Court Institution, I ventured to describe our duties as of a more serious nature, even than those duties of high responsibility which are attached to supreme judicial station in its ordinary course. I stated then, that it was incumbent on those placed over the Jury Court, carefully and judiciously to familiarise the public and professional mind to the introduction of Trial by Jury into our judicial system, that they must proceed, in their very responsible task, with the accuracy which is produced by repeated and unimpassioned consultation between the Bar and the Court, and with the Clerks of the Issues in private. On the Bench they must not confine the exercise of their functions alone, to the care of the case before the Court, but must endeavour to win the favour of the public and the profession to the Institution. They must secure the due administration of the law of Scotland, in all its parts, and called upon for the honest

belonging to the department of Jury Trial, that it may be advisable to continue an enumeration of causes appropriate to that department, and probably to add to the list a number of the causes hitherto sent entire by the Court of Session. Unless some measure of this kind is adopted, there is a great risk that questions would be made in the Outer House on law and relevancy, and other grounds, calculated litigiously to impede the right course of causes to their fair and proper destination in the Jury department.

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honest and upright distribution of justice, in each individual case, they were to take care that every thing should be done to bring the system to its most perfect state of usefulness.

Above all, they had to look forward to the time, "when the Court for trying Civil "Causes by Jury will cease to be a separate Court; and therefore, that the utmost "foresight should be exercised to make provision for incorporating the trial of "matters of civil right by Jury with the ancient judicature of Scotland. So that "when Issues should come to be correct, and settling forms of proceeding was not "likely to disturb the ordinary functions of the Court of Session, the Presidents of "the Divisions of that Court should, at the sittings in Edinburgh, (like the Chief "Justices of England, at the sittings in London and Westminster), try the causes "originating in their respective Courts."

I was called, as it were, from the Bar of England to be the person, under whose care, this great judicial experiment was to be tried. I considered myself as accepting of a most sacred trust, which, if it failed in execution, I must retire from the station, and which, if it succeeded, I was bound to deliver over, in the fullness of time, to the ancient established judicature of Scotland. I was brought into the situation, because I had the character of a Scots Advocate, and the practice of an English Lawyer, to try to suit the legal institutions of my Country to a system of judicature which had for centuries served and adorned the justice of the sister kingdom. The Juries were framed upon the constitution of an English Jury, to be twelve in number, and unanimous in verdict.—A decided departure from our system. Rules of evidence and direction on the law to be dispensed were to be those of Scotland. The forms of proceeding were to be according to the custom of England. I contemplated, if this constitution and custom should be brought to succeed under the experiment, that when it devolved upon the ancient judicatures, (when it again became in a degree experimental), the risks of another experiment would be best guarded against by continuing to follow the system of England. There we saw, as I have said, the Chief Justices of the two Supreme Courts presiding, alone, and constantly, in the metropolis of England, (London and Westminster), in all Civil Causes to be tried by Jury.

The constitution of the Court of Session, as regulated by Statute, presented the ready means of following out the prototype of England, by requiring that the Presidents of the two Divisions of the Court of Session should preside at trials by Jury in the causes originating in their Divisions respectively.

In taking a view of such an arrangement, it is fit to observe, that it is provided by the Legislature, that the Judges of the Jury Court must be qualified to be Senators of the College of Justice. That this was anxiously enacted as a security for the due administration of the law of Scotland in Trial by Jury. At the commencement of the experiment, two things were required in the President of the Jury Court—A person so educated, as to have an undoubted regard to the Institutions and law of Scotland, but whose habits in the Courts of England enabled him to take the principal direction, in the new plan, (to this country), of trying civil causes by Jury.

55 Geo. III. § 11.

There was something fortuitous in this combination, and I anxiously trust it has not been unfortunate. But neither the manifested object of the Legislature, nor any rational expectation of the recurrence of such a coincidence, can afford another appointment of a person so circumstanced, even if it should be thought fit again to look beyond the constituted supreme Court of Scotland, for the supply of a Chief Judge for Trial by Jury. Such an arrangement is not to be treated otherwise than as inadmissible. For if Trial by Jury, in civil causes, is a mystery, not to be executed but by a lawyer from England, it is an Institution not to be persisted in here.

It might require the anomaly of the last eleven years to set the tribunal in motion; but it cannot be fit (if it were practicable) that the anomaly should continue, of combining the practice of English *Nisi prius* with security to the law of Scotland. It follows, therefore, that the Presidency in the Jury Court, (when the devolution shall take place), must be allotted to those who stand pre-eminent in the judicial stations of Scotland.

A repetition of English experience being unattainable, it is satisfactory to think, that

that what presents itself as most becoming, and as required by law, is also consonant to sound principles of judicial policy.

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There is no judicial institution which requires more the superintendance of high and dignified judicial station, than presiding at the trial of the great body of civil causes by Jury, in the Metropolis of the Kingdom. Any person who has witnessed year after year the superintendence of *Nisi prius* in the Metropolis of England, cannot fail to be deeply impressed with the important consideration, that the first Judges in the land should be the Judges *chiefly* to preside over those Juries to whose verdict the greatest civil interests of the community are submitted; and they should preside individually and singly, both because it is the soundest and best constitution of such a Court, and because it adds to the display of dignity, and to a well grounded belief in their superior fitness for the duty.

The effect of individual superintendence has been well proved by the experience of England, but rests on a sounder basis than that experience, powerful as it is. The trial of civil causes, in respect to the presiding over the Jury, suits the effort of a single mind, undisturbed by the views or suggestions arising out of insulated detached observations. Such observations may be wise, but they cannot have the uniformity of plan which must govern him who directs. They divert the attention, and do not aid the views. A person who fills that station, fills it because he is gifted with powers and acquirements which enable him to meet all occurrences, and to place the subject in the best and most impartial light to the Jury. The effect of undivided responsibility on all men is to secure their best efforts. To divide the duty, even in appearance, diminishes this feeling in reality and takes off from the apparent effect.

There are many other powerful reasons in favour of this constitution of a Jury Court, which I forbear to detail. But I must observe, that presiding at trials by Jury is not a duty performed in seclusion. It is a constant series of public exhibition of a most varied and attractive nature. That attraction is greater in proportion to its being a single effort; and the duty gains upon, and occupies the mind more, in proportion as it is not shared by others. There is something fascinating in the exertion of directing Juries in civil causes, which lays hold of the mind, and seems to render all other pursuits inferior in interest. The impressing the minds of other men to the ends of justice, and the endless variety of matter which arises out of the relation of civil life, will account for it. But with me it is not a result drawn from abstract reasoning alone. I have lived a very long life, in public activity, from its commencement. It has been my fortune, in the course of it, to have lived in much intercourse with all the Chief Justices of my time. They were all occupied with the causes which they tried. They formed the favourite subject of their conversation. They seemed to rest their fame on the discharge of that duty. That this should have been the case with those whose pursuits were confined to the Courts of Law may not be unnatural; but if I were to say which of the Chief Justices were most given to direct their conversation to the trial of their causes, I should select those who were active political characters—who mixed in affairs of state—and who had great intercourse with the world. I have had the same experience of the impressive nature of *this* judicial duty in instances, where a principal part of the jurisdiction of the Court is in matters of equity. I never knew the eminent persons at the head of the Court of Exchequer in England make their equity cases a part of their conversation; but their causes at *Nisi prius* formed a constant theme.

If this be human nature, and such the attraction of presiding over juries, (another name for the great and interesting work of directing the minds of our fellow men to perform the duties of impartial justice), I must draw this conclusion from my experience, as well as from the reason of the thing, that those who are called on, after the union of Trial by Jury in the Court of Session, to preside over civil juries, in *our* Metropolis, will feel the same impulse; and if there has been any apprehension of that duty becoming secondary and subordinate to any other branch of the judicial functions, which they have to perform, it is equally adverse to conclusions of reason, and proofs of experience.

It will be felt and understood by capable and superior minds, that there is a great difference between the generally plain and obvious course of criminal proceedings, and the administration of justice in a civil tribunal constituted by jury. Questions arising out of crime are simple, so are those causes which arise in matters of revenue.

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But the various nature of civil rights are different. The contracts of mankind present an endless variety of facts. The legal principles on which they depend must be at command, to be laid down in all cases where there is a compound of law and of fact; and there is hardly any general verdict that does not include a proposition of law. The numerous points of evidence to be decided on the instant—the interest of private parties to make those points—the unremitting attention to the facts as they arise—a power of selection to give them effect, in directing the attention of the jury to the essential points—requires a comprehensive view of the facts of the cause, and a ready application of those branches of legal knowledge which belong to the subjects agitated in such a Court. To all this may be added the power of leading the Jury to make the verdict the result of their own judgments, founded on a clear, distinct, and unprejudiced view of the case before them.

In the trial of an indictment for stealing a horse, the Judge has to see that the case is correctly conducted, and, on the humane injunction of the law, to insure, that while justice is done to the public, nothing is allowed to press unfairly on the accused. It is, in general, a plain and simple case of fact. But in trying the sale of a horse, there are involved some of the nicest legal questions connected with the contract of sale, with warranties and the like. And the object in respect to the evidence, is to keep an even and unbiassed mind.

In criminal cases, the public prosecutor pursues a straight course, and the prisoner's Counsel has the fair protection of the Court. But in private suits, a constant and watchful attention over the Bar is required, and that even-handed course, which requires perpetual thought, to prevent a leaning in the cause. This does not seem to me to be any exaggerated view of a very considerable portion of those trials that arise in civil causes. But there can be no want of confidence as to such qualities being found in those who are worthy of the highest stations in the seat of judgment.

I need not observe, that I regard with the highest respect, the great talent and learning required for discharging the difficult duties which belong to the superintendence of criminal judicature. It is the distinct nature of the two duties which I am desirous to enforce, and not the superiority of either.

There arises out of the arrangement proposed, another consideration, which has always been strongly impressed on my mind, as deeply rooted in those principles of policy which should regulate in the constitution of Courts.

In England, by a system of fictions (which it is unnecessary to enter upon), the Court of King's Bench has for ages had concurrent jurisdiction with the Court of Common Pleas. The effect of this has been, to give the suitors a choice of Courts instead of compulsively forcing them to a single tribunal. This is a great and important privilege of the subject, but it is more important still, in its effects upon the administration of justice. Those who have witnessed the efforts of the Chief Justices of England, in their respective Courts, cannot fail to have been impressed with the happy effects of the liberal emulation which has always actuated them in the performance of the duties of their high stations.

An Act of the Legislature has given to this country what the fictions of the law established in England, namely, two supreme tribunals for the lieges to select. It would be losing the benefit of the wise principle which dictated that regulation, if it was not to be followed up in presiding over trial by Jury in civil causes. It was a measure of necessity which led to have but one Court, and one Chief Judge in the Jury Court; and it was a temporary measure, and so it ought to have been, for no man can tell how his mind may be turned to an unwise system, if there is no corrective by comparison.

In impressing these considerations of judicial policy, I do not hold out a grovelling course of competition, which would degrade eminent judicial station, but a splendid and dignified course of emulation in the performance of the highest duty that man can perform to man, superintending and directing in the ascertainment of his rights by the distribution of enlightened and impartial justice.

In the current of time, since I came to this country to preside in this Institution, various suggestions have been made as to the final settlement of trial by Jury in the Court of Session.—I have considered them all deliberately, and I am not so wedded to first thoughts, I trust, as not to be ready to have my reason convinced. Such plans

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plans of incorporation I know have been supported by most gifted persons. This has made me consider it as a duty to disclose, perhaps at too much length, the reasons on which my opinion is founded, and on which I conclude, that the trying part of the tribunal should be presided over in Edinburgh by the Presidents of Divisions respectively, in the causes of their respective Courts.

I think there should be one imperative exception from this, viz. If an Issue is sent for trial for the information of the Court which sends it (like an Issue out of Chancery in England), it should be tried by the President of the other Division. But there should be no substitute of one President for another. If health or other imperative cause prevents, some other Judge of the Division, or the preparing Ordinary, should try *.

With respect to motions and preparations, I have already said, that I think they should be before the Lord Ordinary of the Jury Court department, and that the Lords Ordinary who have now joined me, should at the period of union be placed one in one Division, and the other in the other. That the jurisdiction in new trials, bills of exception, and special verdicts, should rest with the Divisions respectively.

I have said nothing about trials similar to the English trial at Bar; my opinion is, that they should be continued on their present footing, always to consist of three, that there may be no stop by equal division, or any casting voice. The selection of Judges for them is a matter of minute regulation; perhaps one should be chosen by the President at the time, perhaps the preparing Ordinary to be one, as being likely to be acquainted with the magnitude and importance of the points in the cause. I would venture to recommend a limited use of this selection.

It does not appear to me that at any future time there will be any necessity for all the fifteen Judges being practised in the trial of causes—and to disperse the present number of trials into many hands, would defeat the important object of able superintendence. Until the Circuits grow a greater object, by reason of the number of causes to be tried there increasing, they might be tried by a Lord of Justiciary, suiting them to the period of the Justiciary Court.

I have now to close, with a sincere apology for the length of this statement, and with a feeling of great anxiety that it may be useful. My task, during the eleven years of the experiment, has not been a light one. If it turns out to be for the service of justice in Scotland, I shall be more than repaid for much anxious thought, and some bodily labour. My service in the number of causes, at the trial of which I have presided, if compared with the number of causes tried in London and Westminster, is as a drop in the ocean. But the subject was new to all but myself, and the trials have been long and laborious, and I have very frequently had more points to decide *instanter*, in one cause, than occur in England in a whole sitting. The great and anxious labour, however, has been that of forming the system, the effect of which, and the mode of acting in it, is now fully before the Commissioners, so that its merits or demerits may be judged of.

This great and arduous part of the task could not have been accomplished by my single unaided strength. If I had not been sustained, supported, encouraged, and enlightened by the constant attention of those excellent and superior men, who have been my colleagues, during the whole period of eleven years, I must have sunk under a weight too great for my intellect, my knowledge, and the anxiety of my disposition. Their time and their talents have been always at my command, in innumerable private conferences, important, beyond expression, to the establishment of the system.

Without them, I could not have accomplished what I have laid before you, and I hope I have not stept aside from the path of propriety in thus recording my sense of their merit and services, in respect to the Institution of Trial by Jury in civil causes. Their high merit in Court is recognised by the Bar and the public. But what I refer to does not meet the public eye, and to make the constant private valuable efforts of eleven years known, is due to justice.

17th February 1827. (signed) *William Adam.*

* In England it has been the custom for the same puisne Judge to try for the Chief Justice, when just cause prevented his attendance. Mr. Justice Gould sat for Lord Walsingham, Mr. Justice Buller for Lord Mansfield, Mr. Justice Le Blanc for Lord Ellenborough.

LISTS OF ACTIONS referred to in the preceding Statement.

No. I.

Actions appropriated to the Jury Court by 6 Geo. IV. c. 120.

1. All Actions on account of injury to the person, real or verbal, as Assaults and Battery.
2. Defamation and Libel.
3. Actions on account of injury to Moveables or Land, when in this last case the title is not in question.
4. Actions for Damages for Breach of Promise of Marriage.
5. Actions for Seduction.
6. ——— for Adultery.
7. ——— for Delinquency or *quasi* Delinquency of any kind, where the conclusion shall be for Damages only, and Expenses.
8. All Actions on the responsibility of Ship Masters and Ship Owners.
9. All Actions on the responsibility of Carriers by Land and Water.
10. Innkeepers or Stablers, for the safe custody and care of Goods and Commodities, Horses, Money, Jewels, Clothes, and other Articles; and, in general, all Actions grounded on the principle of the Edict *nautæ caupones stabularii.*
11. All Actions brought for Nuisance.
12. All Actions of Reduction on the head of Furiosity and Idiotcy, Facility and Lesion, Force and Fear.
13. All Actions on Maritime Policies of Insurance.
14. All Actions on Insurance for Loss by Fire.
15. All Actions on Insurance of Lives.
16. All Actions on Charter Parties.
17. All Actions on Bills of Lading, Freight.
18. Contracts for Carriage of Goods by Land or Water.
19. For the Wages of Masters and Mariners of Ships.

No. II.

Actions not appropriated, but invariably remitted entire by the Court of Session to the Jury Court.

1. Reductions on the head of Death-bed.
2. Actions of Damages for Breach of Contract.
3. ——— of Invasions of Patent Right.
4. ——— of Rights of public Highways.
5. ——— of Servitudes of Roads.
6. ——— for diverting Water Courses.
7. ——— of other Servitudes.
8. ——— of Appointments to Magisterial and other Public Offices.
9. ——— of Contracts of Service.
10. ——— of Apprenticeship.
11. ——— of Wrongous Imprisonment.
12. ——— of Bills of Exchange and Promissory Notes.
13. ——— of Reductions of Deeds, as not executed according to the solemnities of the statutes or law—as obtained by fraud or forgery—and, generally, all cases of Reduction not included in the Actions appropriated to the Jury Court, except Death-bed.
14. ——— of Contracts of Sale.
15. ——— for Furnishings.
16. ——— for Abstraction of Multures.

* * * *

17. ——— of Contract for the Performance of Work.
18. ——— for Injuries to Houses or Structures of any Description.

No. X.

JURY COURT COMMISSION.

Wednesday, 7th *February* 1827.

The Right Honourable the *Lord President* in the Chair.

Lord Pitmilly, one of the Judges of the Jury Court; Examined.

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Lord Pitmilly.

HAVE you seen the printed Return that has been given in by the Lord Chief Commissioner?—I read it last night.

Do you concur generally with the opinions and the statement of the mode of proceeding in the Jury Court which have been given by his Lordship?—The Statement contains a variety of very minute details, which I have just had the opportunity of reading; and, without studying them, and reading the references, I cannot be expected to speak to all the points stated there, but I saw nothing to object to; and I completely concur in every thing that can be called the precise answers to the questions put in the requisition.

Does it occur to your Lordship to state any thing in addition?—No; unless some particular question is put to me, there is nothing that occurs to me.

Do you approve of those alterations which his Lordship has suggested, with a view to ameliorate the preparations of causes?—Entirely. I think they will have a very great effect.

Do you concur with his Lordship in thinking it will tend to diffuse a knowledge of the system more generally throughout the profession?—It certainly will; and it will also tend to perfect the system.

You have no doubt, have you, that, by the expiry of the present Act, the proposed union of the two Courts may be completed with safety?—I think so.

How long has your Lordship been a member of the Jury Court?—I have been a member of that Court from its institution in 1815, and I have been present at a great many trials.

Then you have had great opportunities of seeing the course of business in that Court?—Throughout.

Will you have the goodness to state to the Commissioners whether, during the present existence of the Jury Court, it might not be of advantage if the other Ordinaries of the Outer House occasionally, or in some kind of rotation, sat and assisted the other Judges in the preparation of Issues, so as to diffuse a knowledge of the system among them?—I think it may be of some use in the way of giving them information and instruction; it would tend to diffuse the knowledge.

Is there any thing else which it occurs to your Lordship to state?—I ought to say, that I very much approve of the suggestion that was made by Mr. Solicitor General, as to the mode of conducting causes by Counsel, that the same Counsel, who opens a cause for the pursuer, should be considered as the leading Counsel, and should take the reply. I think that is of very great importance, and I have very often, indeed in every case, lamented it was not so arranged. I have seen cause to observe great inconvenience from its being differently planned. I think if that were done, much greater attention would be bestowed by the other Counsel in the cause to the conducting of the evidence. It appears to me the Counsel should divide the witnesses among themselves, and each Counsel should take a witness, and go on with the examination of that witness, without any interruption whatever from the Bar or the Bench, and they should also conduct the objections to the questions. I think that is a part of our system in which we are a little defective, and which would be much improved, and would tend to the benefit of the junior Counsel, if the rule were strictly enforced upon that subject. It is laid down in the rules and regulations of the Jury Court, and, I think, in all cases should be enforced.

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Lord *Pitmilly.*

There is also a point of minor importance which I may mention here. In conducting a cause, suppose a single Judge presides without any one to assist him, if it is a long cause, and there are a number of witnesses, it would be very important to give him as much leisure as possible to look over his notes, and to rest himself between the withdrawing of one witness, and the calling up of another. Now, according to our rule, the witnesses are sworn by the presiding Judge. We thought ourselves obliged to do so, in consequence of a clause in the Act which refers to the forms in the Court of Justiciary. Therefore we laid down a rule that the Judge should swear the witnesses. It appears to me it would be a considerable relief to the presiding Judge if that were done by the Clerk.

Making allowance for the novelty of the Institution of the Jury Court, and the inexperience of the Divisions of the Court of Session, has your Lordship been satisfied with the manner in which motions for new trials, so long as they were made in the Divisions, and discussions with regard to bills of exceptions, have been conducted there?—Yes, I think so.

Lord Gillies, one of the Judges of the Jury Court; Examined.

Lord *Gillies.*

YOUR Lordship having heard the evidence that has just been given by Lord Pitmilly, do you concur in his observations, or have you any thing in addition to suggest?—I entirely concur in the observations made by Lord Pitmilly. I also, in general, concur with his Lordship, in approving of the opinions and statement of the mode of proceeding in the Jury Court, given by the Lord Chief Commissioner, and of the alteration suggested by his Lordship, with the view to ameliorate the preparation of causes, and likewise in thinking, that, at the expiration of the present Act, the proposed union of the Courts may be completed with safety. There is one point, however, in the Lord Chief Commissioner's statement, on which I am not yet prepared to offer any definitive opinion. I here allude to the particular mode, suggested by the Lord Chief Commissioner, for effecting the union of the Courts, and for the conduct of business after they are united; as to which, I think it premature, at present, to suggest any specific plan or arrangement, conceiving this to be a matter on which farther experience may still be expected to throw considerable light.

How long have you been a Judge of the Jury Court?—I was appointed in the Summer of 1816.

Do you consider the system of the Jury Court has been much perfected by means of private conferences with the Judges?—Very greatly. I consider these private conferences of the Judges to be highly beneficial.

Do you concur with Lord Pitmilly in thinking, that, at the expiration of the present Act, the proposed union could be safely accomplished?—Yes; perhaps it may be right to say, I completely concur with his Lordship in approving of the suggestion of Mr. Solicitor General, as to the propriety of making the regulation, that the leading Counsel should open and reply. I think also it would be an advantage, and would contribute greatly to the saving of time, if it were the general rule, that the whole of the witnesses should not, as at present, be excluded from the Court, but should be permitted to be present during the whole course of the trial; it being always understood, however, that it is in the power of either party to object to their presence, and to insist that they shall be removed from Court.

Lord *Pitmilly.*

(To *Lord Pitmilly.*) What is your Lordship's opinion with regard to the regulation which has just been proposed, of allowing witnesses to remain in Court during the trial, except when their exclusion is insisted upon by either party?—I think that it would save time.

Lord Chief Commissioner.

(To the *Lord Chief Commissioner.*) What is your Lordship's opinion upon that subject?—It would save time, not only in respect to witnesses knowing the preliminary matter, so that the Counsel could examine them at once to the substance of the cause, but it would save very considerable time in the mere act of going backwards and forwards, which I have computed to cost us nearly one hour and a half in the course of a very long trial. I do not think, from the experience I have ever had any where, that the presence of the witnesses in Court would, in the general run of causes, disturb the ends of justice; that is consonant to what I have gathered from

from my experience, both in England and here. There have been many instances here in which they have been present, and I have not found that the ends of justice were not as well attained in these cases, as in those where they have been excluded. At the same time, there are cases where they ought to be excluded. There is great time lost in making any arrangement about it, that has been experienced frequently in those sort of cases where there have been scientific witnesses called upon to speak their opinion upon facts. We have frequently made the arrangement, that witnesses that are to speak as to facts upon which scientific men were to give their opinion, should speak in the presence of those scientific men; it has always cost a great deal of time to get that arranged. We have not always succeeded in doing so; the consequence of which has been, the witnesses, who are to speak scientifically as to the effect of such and such facts, have been obliged to receive the testimony as to these facts, not upon what they have heard the witnesses say, but upon what is stated to them from the Judges' notes of what the witnesses had said, which is by no means so satisfactory. I mention this, as an illustration of the difficulty which arises from making it a matter of arrangement, instead of allowing it to be a general rule, that witnesses should be permitted to remain in Court during the trial.

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Lord Chief Commissioner.

With respect to the manner of conducting the trial of causes at the Bar, I entirely agree with what Mr. Solicitor General stated, and I was extremely happy to hear him mention it. It was quite consonant, in my opinion, to principle, and it came from him with great propriety, filling the situation he does at the Bar. I likewise perfectly agree with Lord Pitmilly and Lord Gillies in the view they took of the matter. I consider it would tend greatly to the shortening of causes, and therefore to the better administration of justice in the Jury Court. There is nothing more prejudicial than the length to which they are carried by various accidental circumstances. I do not mean to limit the length, when it is substantially necessary for the benefit of the cause; but accidental circumstances make them long, and this wears out both mind and body, and render all parties, who are to administer justice, less equal to the discharge of their duty. When a leading Counsel is to take charge of the cause in the beginning, and the whole of it is to rest on his mind, he makes himself completely master of the subject before coming into Court; he condenses all he has to state; he lays down his plan, and he executes according to that plan; and he is sure there is no desultory matter to be brought in, which he is afterwards to remit or avoid. He forms his plan in the first instance, and to that he is bound. He cannot be varying the manner in which he is to put the case, except as the facts vary it. Under these circumstances, I am clearly of opinion, that that regulation would be attended with the best effects, and that it would be equally beneficial to the junior part of the Bar, as to the senior Counsel in the cause; for they would prepare themselves with more particularity for the examination of witnesses. They would display their talents in the examinations, and in all objections taken to the evidence, they would argue those points, and be more masters of the manner of arguing, and they would come forward to the public better in that way, and to the Court also, than in the present mode by merely making a speech, and then doing little more in the cause. These are the reasons why I perfectly agree with what has been stated. I need not add, that when, in the year 1815, the Act of Sederunt was proposed, there were rules and regulations at the same time for the Jury Court, which accompanied it; and in the original draft of these regulations, this stood as the rule for proceeding in the causes, but it was departed from, upon the strong representation of the Bar, that it was contrary to the usual course of proceeding in this country, and would be of great prejudice to the junior part of the Bar. It was the senior part of the Bar who brought that objection to me, and with so much vehemence, that I was under the necessity of giving way to it.

Does your Lordship understand that this matter can be arranged by Act of Sederunt?—Yes; by a regulation of the Jury Court, it is a means of improving the system.

(To the *Lord Chief Baron* of the *Exchequer*.) Your Lordship having read the printed return given by the Lord Chief Commissioner, and having heard the opinions which have been expressed to-day by several members of this Commission; will you have the goodness to state if you concur in them; or have you any difference of opinion, or any thing in addition to suggest?—My opinion may be biassed from what I know of English practice; but as far I can endeavour to get rid of any pre-

Lord Chief Baron.

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Lord Chief Baron.

judice of that sort, I have, no doubt, myself, that the practice of the same Counsel opening and replying in a cause, tends more to the real purposes of justice; and I am quite satisfied it is better for the client, that the case should be under the conduct of the leader, who should be the person to state the facts to the Jury, and argue on them, and reply, instead of one Counsel opening, and another replying. My mind is most strongly impressed with the notion, that it answers better the purposes of justice, and the interests of the client.

Your Lordship does not think it would be attended with any prejudice to the junior part of the Bar?—I do not think so. There is no doubt that the other mode of proceeding sometimes gives a young man an opportunity of making a display, which, but for that circumstance, he would not at that time have; but I think the interests of the junior part of the Bar would be as well consulted, if not better, by the proposed arrangement.

You are not of opinion that the interests of the junior members of the Bar should stand in the way of the interests of justice?—I feel as strongly for the interests of the junior part of the Bar as any man can possibly do, who has been in the profession. But even if it did militate against their interests, if it were better for the purposes of justice, and for the benefit of suitors in other causes, it should not be an objection.

Would you propose that it should be a rule that the junior Counsel should argue any questions of law arising out of the examination of his own witness?—Certainly.

Does your Lordship think he should have the sole power of arguing it?—Generally speaking, I believe, it is better that only one Counsel should argue the incidental point of law which arises in the course of the cause, but I feel a little difficulty in saying, if it is a point of law of importance, that it should strictly be confined to that person. I think that is generally as it were arranged between the other Counsel who generally feel and say, that there is no necessity to add anything.

Lord Chief Commissioner.

(To the *Lord Chief Commissioner.*) Is there any further suggestion which occurs to you to mention?—There is one point which has given rise to a good deal of consideration in my mind, which is connected with another of very great importance; I mean the introduction of the power to nonsuit. The introduction of the power to nonsuit is of the greatest importance; but I wish to observe, that it ought to be done with such precautions as will prevent the abuse of it. In England, there are two circumstances which render it the means of abuse; the one is that a plaintiff, when he finds his cause not going on to his liking, chooses to be nonsuited, and lies by, and brings a fresh action, not having had judgment against him. He has a great advantage by that means in many respects, as we can easily conceive. The other circumstance is, the Judge may propose to nonsuit him; but if he does not choose, he will not be nonsuited. Now these are two advantages that a plaintiff has; and I think it would be right well to consider how the power or the regulation of nonsuit could be introduced, so as to avoid the inconvenience and injustice, arising from those two results which belong to a nonsuit, or its concomitants in England. I only state it as a subject for consideration. I have not given it all the deliberation I would wish to give it, nor have I had any converse with any body about it; it would require a good deal of conference and consideration. I will just state now what has occurred to me, which is this, that the pursuer shall not have a power to withdraw himself from the cause, unless with the approbation of the Court; and that the pursuer should be compelled to be nonsuited, subject to the liberty of moving to set it aside, upon a motion for another trial; and he should not have the power of appearing, whether the Court will or no. I have known that practised, and great disadvantages arise from it. It appeared to me it was not fit to introduce this into the statement which I have given in, which I was desired to make; but I thought it right much time should not pass over in the Commission without an observation being made upon it. I think the suggestion of Mr. Solicitor-General, as to that, is of the utmost importance, subject to consideration. Now that has suggested to my mind another course of proceeding, which I think is a defect at present in our Institution, and that is with regard to applications to arrest the judgment, which may very frequently be very fit; much more fit than taking the course of proceeding under a bill of exceptions. It may apply to many cases to which a bill of exceptions would not apply; as for example, here is a question on

which

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which the Judge directs the Jury with respect to the law; and if they are of opinion the fact is so and so, they will find their verdict accordingly; and if they are of opinion the fact is the other way, they will find their verdict differently; but in that very case there may exist a positive bar to the action, founded upon matter of law; as for instance, that there is a statute in the way, or the like. Now it would surely be advisable to consider whether, upon the principle in England, that where there is a legal objection which can be put upon record, which is a ground for arresting judgment, when the case stands in that predicament here by the legal objection being on the record, there should be a power of arresting the judgment, so as not to allow it to go out against law, merely because it happens that there is a favourable verdict.

Mr. *Solicitor General*, further Examined.

Mr. *Solicitor General's* 2d Examination.

IT has been understood that you wish to make some addition to your former evidence, upon some points which were omitted, or not sufficiently explained, will you have the goodness to proceed with any further observations which you are desirous of making?—I was anxious to be allowed to offer to the Commission some observations, with reference to a suggestion contained in the paper given in to the Commission by the Lord Chief Commissioner, respecting a clause in the recent Act, by which the list of witnesses furnished by the different parties to each other, before trial was abolished. I did not formerly notice the point, because I wished the suggestion, in the first instance, to be made by his Lordship. No doubt there were some inconveniences attending the regulation by which those lists were required—inconveniences, however, most of which, I believe, will wear away according as the practice of the country may familiarize us more to those lists, and as the Court come to have more opportunities of deciding the grounds upon which witnesses should be allowed to be added to the list within the prescribed time, which was always done upon reasonable cause shown.—The objection to the list of witnesses, I understood, to be this:—That it was supposed, by giving lists of witnesses, that this happened, namely, that, in order partly to mislead the opposite party as to those you intended to examine, and from the over anxiety of clients and agents, an immense number of witnesses were brought to Edinburgh, or to the Circuit Towns—that Counsel were not sufficiently consulted beforehand as to the witnesses who should attend—that a multitude of persons were included in the list, and they were all brought to the place where the trial was to take place, thus adding unnecessarily to the expenses of the trial; expenses which can never be obtained from the other party, even though the cause were gained. I believe that result still remains, though the list of witnesses has been abolished. I have lately been at several long cases where the number of witnesses brought together was very great indeed, in consequence of the anxiety of the parties in collecting witnesses, to an extent fully equal to what ever occurred when the list of witnesses were given before trial. I know that this has been equally the case in Edinburgh, and on the Circuits. On the other hand, I do not think that the requiring lists had any tendency in reality to lead to that result. No doubt parties did certainly include a number of persons in the list, for the purpose of misleading the adversary, as to those who were to be examined. That was an unavoidable drawback on the advantages attending, in my opinion, the exchanging lists of witnesses. But, at the same time, when a client or agent saw the names of the witnesses in the list of the opposite party, it was very easy for them, and at all events for the client, to know who were truly those who knew any thing about the matter. Besides, that abuse might be easily checked. At present the evils of the alteration have been experienced very strongly indeed in cases of difficulty and importance, or where there was contradictory evidence in point of fact, from the parties not knowing any thing of the witnesses who were to be examined. One case was tried in the Jury Court about eighteen months ago in Glasgow; a case of a reduction of a verdict of cognition, on the ground that the person cognosced had, from interested motives, feigned imbecility of mind. During the whole course of the trial, (two days in length,) with the exception of one or two witnesses, we were ignorant on the part of the defender, of almost every individual person who was examined. It was a case of a peculiar description, because people had been employed to watch the man's conduct for weeks—they had been engaging him to travel with them—they had been with him throughout different parts of the country—had been employed as spies upon him; and until they were examined, we were utterly ignorant of the existence of these people, or the evidence they could give when brought into the box. From

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Mr. *Solicitor General's* 2d Examination.

the individual himself, in his state of mind, we could get no information. Discarded clerks of the agent of the defender's guardian were brought upon us by surprise; and down to the very moment, when the case was disclosed in evidence, we were quite ignorant of the line of evidence to be proved by the pursuer. In several other cases, I have seen the like result most mischievously attending the abolition of lists of witnesses:—it has occasioned the utmost uncertainty as to what is to be proved, and also as to the character of the witnesses; and the alteration has contributed greatly to that which is the great object of our proceedings, preparatory to trials, to prevent, namely, surprise,—which every other regulation connected with the preparation of causes in the Jury Court most usefully and beneficially tends to prevent. It is the great object of the condescendences or the answers to prevent surprise, and the utmost pains are taken, that neither the Court nor the party shall be taken by surprise; while, on the other hand, though you may still know the fact that is averred, you are nearly deprived of the whole benefit of such regulations, by being left in utter ignorance of the parties by whom the case of your adversary is to be proved, and have not any previous knowledge of their character. Parties are thus induced to get up cases by evidence, which, probably, had the lists of witnesses been exchanged, they would not venture to adduce; the chance being so great, that their adversary will not be prepared to meet or explain such evidence. Some instances have already occurred, leading to a strong suspicion of subornation; and, I think, that the abolition of the list of witnesses creates many temptations, and affords many facilities, for such practices.

But, besides the great uncertainty it creates, the change is attended, in my opinion, with this result,—it has a great tendency to introduce an over anxious, and an indiscriminately severe practice of cross-examination, to which there are many objections, if it is to be resorted to as the *remedy* for the defect of not giving previous notice of witnesses, and is to be the only method by which any thing can be known of witnesses. When you know nothing about the character of a witness, who is brought to prove facts against you, you must try to find it out in order to try his credibility, and the consistency of his statements. Whereas if you know, by previous inquiries, that the persons who are called are honest witnesses, though they are mistaken in their evidence, the object will be to put no questions at all to them, or at least, not to subject them to an unmerited severity of cross-examination; for you know that they are not perjuring themselves; and you do no good to your client by showing that you suspect witnesses, who are conscientiously giving evidence which they believe to be true, and which is the result of their unbiassed and honest recollection. On the other hand, if you do know, from previous inquiry, that the witnesses are likely to be biassed, you have a good index to point out the objects and character of the examination; you know how far to carry it, and in what instances it should be resorted to.—Thus, by the practice of exchanging lists, the temptation and pretext for carrying the severity of cross-examination to an extent, which often seems an abuse in the administration of justice, and is frequently attended with much pain to respectable individuals without any benefit to the parties, are avoided. I think the abolition of the lists of witnesses imposes upon us a necessity of cross-examining in many cases where it turns out that we ought not to do so; it lengthens the duration of trials, and operates still more prejudicially in tending to introduce a style and tone of cross-examination which, I do not think, it is at all for the advantage of the Bar, or for the interests of justice, should be introduced.

Then there is another effect, which, I understand, has been experienced in practice to a very great degree; that is, the increased expense of preparatory inquiries, and of precognoscing witnesses before trial, to an extent which it is hardly possible to conceive. If a trial is to take place, in which the party is at all afraid of the evidence on the other side, the agent, of course, is directed to do every thing in his power to find out who are to be summoned, and what they are to say. He is led to make inquiries in the country upon every report he hears, that such and such persons are to be called; reports, perhaps, spread purposely to mislead. I understand, in many instances, the expense of the preparation for the trial, has been greatly increased by the abolition of the list of witnesses; and that to an extent, which I could not have believed, had I not been assured of it by respectable agents, who stated, that they regretted greatly the necessity of making such charges against their clients; charges which never can be recovered from the opposite party, even if the cause is gained; and an expense which often is utterly thrown away. In one case, I have occasion to know, it was industriously circulated in the country, that a great

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number of people were to be summoned from a remote district of the country;—all of whom were seen by the agent, to know what they knew of the case; but not one of whom was called, while there was not the least intimation given on the spot of those who actually were called. The expense to the client was thus increased, immensely, in consequence of the abolition of the list of witnesses. Of course, it may be very necessary upon reasonable cause shown, that additional witnesses should be allowed to be examined, who are not included originally in the lists, if they have not come to the knowledge of the parties, until a day or two before the trial; and, in such cases, the Court always admitted them when there was the least necessity for doing so.

I believe it to be extremely necessary to throw as much restraint as is reasonable upon the expense, in which parties may be led to indulge, in the previous preparation for trials; but, as I have stated, I am persuaded that the expense to the parties has been generally increased, by the abolition of the lists of witnesses.

Are there any other points on which you would wish to offer any observations to the Commissioners?—I entirely concur in the suggestion of the Lord Chief Commissioner, that there should be some means of moving in arrest of judgment.

Would you approve of allowing any motion to be made in arrest of judgment on any matter of law, that had not been previously stated in the note of pleas, ori n the condescendences and answers?—It might not be so often necessary, in cases properly prepared under the new Act; but it becomes so in some cases that are sent from the Court of Session to the Jury Court for trial.

Lord *Pitmilly*.

(To *Lord Pitmilly*.) What is your opinion with regard to a single Judge presiding at a trial, or more than one being allowed to preside, when such additional assistance is conceived to be necessary?—I entirely concur in the suggestion which has been made by the Lord Chief Commissioner, that the best mode of trying causes is before a single Judge. At the commencement of the Institution, it was absolutely necessary there should be more Judges than one; and accordingly I believe it will be found, upon looking at Mr. Murray's Reports for two years, that two or three always sat in the Court. In like manner, when the Institution shall be first joined to the Court of Session, it may be very desirable for some time that there should be more Judges than one, for reasons similar to those which influenced us at first. But the longer the Institution exists, and the more perfect it becomes, I think it will then be much the best way of administering justice, that a single Judge should sit to try the cause, and that any error he may commit should be corrected by means of a bill of exceptions, or a motion for a new trial before the Division. I am clearly of that opinion. The reasons are fully stated in Mr. Solicitor General's evidence, and I concur in every word he stated on the subject, and also in the statement of the Lord Chief Commissioner.

Would you make it a matter of legislative enactment, or would you leave it to the Court, to regulate whether one or more Judges should preside for some time?—I think it should be entirely left to the Court, or to the discretion of the individual Judges, including the presiding Judge, who might ask another to attend; and no doubt they would wish to do so more frequently than was necessary for the trial itself.

Lord *Gillies*.

(To *Lord Gillies*.) Do you concur in the opinion which has now been expressed by Mr. Solicitor General?—I concur entirely with what Mr. Solicitor General and the Lord Chief Commissioner have stated.

Mr. *Jollie*.

(To *Mr. Jollie*.) What is your opinion as to the abolition of the list of witnesses?—My opinion is most decided, and I believe it is the general opinion of gentlemen of my own profession, that it would be a very great improvement if that were restored. I concur entirely with the observations that have been made by Mr. Solicitor General, that it has occasioned, in many instances, very grievous expense to the parties, from the uncertainty as to the witnesses, and the want of knowledge of the characters of the individuals who were afterwards brought forward. Upon the other subject which has been mentioned to-day, in a proposition from my Lord Gillies, as to the admission of witnesses into Court during the trial, I should humbly think it required a great deal of deliberate consideration. There is a general sentiment in the country, that it is a great advantage we have over the practice in English Courts, by witnesses being prevented from attending the Court during the examination of the other Witnesses.

Tuesday, 13th February 1827.

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The Honourable *Lord Corehouse*, one of the Judges of the Court of Session, and a Member of the Commission, Examined.

Lord *Corehouse.*

YOUR Lordship was formerly Dean of the Faculty of Advocates?—I was

Your Lordship being aware of the suggestion which has been made by Mr. Solicitor General, as to an alteration in the mode of conducting the trial of causes in the Jury Court, by requiring that the leading Counsel shall both open the case to the Jury, and reply; what is your opinion as to that proposal?—I entirely concur in the suggestion of Mr. Solicitor General.

George Joseph Bell, Esquire, Advocate, Professor of Scotch Law in the University of Edinburgh, and a Member of the Commission, Examined.

Mr. *Bell.*

WHAT is your opinion with regard to the suggestion of Mr. Solicitor General, which has just been alluded to?—I entirely concur with the suggestion of Mr. Solicitor General.